No. 88-1434

(8)

In the Supreme Court of the United States

OCTOBER TERM, 1988

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.,
PETITIONERS

v.

UNITED STEELWORKERS OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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10 pp

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* The opinion and judgment of the court of appeals, the denial of petitions for rehearing, the Office of Management and Budget's disapproval of certain provisions of the hazard communication standard, and related correspondence have been reproduced in the petition for writ of certiorari. The materials reproduced herein, which are not "parts of the record" (Sup. Ct. R. 30.1), have been reproduced by agreement of the parties for the convenience of the Court.

INDEX – Continued:

Chronological List Of Relevant Docket Entries

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-3554, 83-3562 & 83-3565
84-3066, 84-3093 & 84-3128

UNITED STEELWORKERS OF AMERICA, PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, ETC., RESPONDENT

PUBLIC CITIZEN, INC., ET AL., PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, ETC., RESPONDENT

[Docketed Nov. 22, 1983]

DATE	FILINGS – PROCEEDINGS
1985	
	* * * * *
May 24	Judgment granting in so far as stated below. Further ordering & Adjudging the Hazard Communication Standard to the extent that it is valid, et al. Further ordering & adjudging that the Sec's rejection to the RTECS list overinclusive is supported by substantial evidence, consistent w/the OSH' Act's

DATE FILINGS – PROCEEDINGS

statutory purpose, & is therefore valid. Further order & adjudged that the definition of trade secrets, which is broader than the protection afforded trade secrets by state law, is invalid & the Sec. is directed to reconsider a trade secret, et al. It is further ordered & adjudged that the trade secret access rule in the standard is invalid insofar as it limits access to health professionals, but is otherwise valid, & the Sec. is directed to adopt a rule permitting access by employees & their collective bargaining representatives. All the above in accordance with the opinion of this Court. filed (cvs 83-3554 83-3561 83-3565 84-3066 84-3093 & 84-3128) (sa)

* * * * *

1987

Jan. 27 Mot. by petitioners requesting that this Ct. dir. the Sec., within two weeks of this Ct.'s action, (a) to order extension of the Hazard Communication Standard to all employers cvd. by the OSH Act – & to set the effective date of the amendment no more than ninety days after its announcement, *see* 29 U.S.C. § 655(b)(4) – or (b) to state why such extension is infeasible. In addition, petitioners ask the Ct. to hold the Sec. in civil contempt for failing to comply with the Ct.'s earlier judgment. In view of the importance of this case and the issues raised by the instant mot., petitioners further request that the Ct. schedule oral argument on petitioners' mot.

DATE FILINGS – PROCEEDINGS

w/serv. filed (cvs. 83-3554, 83-3561, 83-3565, 84-3066, 84-3093 & 84-3128) (sa)

* * * * *

Mar. 23 Heard on pet. of United Steelworkers of America for further relief w/respect to prior dec. of this Court. Coram: Gibbons, ChJ, Fisher & Kelly, DJ At the hearing cnsl for resp. requested permission to have transcript prepared of oral argmt. & Ct. granted permission. (Cvs. 83-3554, 3561, 3565, 84-3066, 3093 & 3128) (ab)

* * * * *

May 29 Opinion of the Court (*Gibbons*, Chief Judge Fisher, Chief Judge* and Kelly, District Judge**) filed (cvs. 83-3554, etc.) *Hon. Clarkson S. Fisher, Chief Judge; U.S. Dist. Ct. for the Dist. of NJ sitting by designation.** Hon. James M. Kelly, U.S. Dist. Ct. Judge for the Eastern District of PA sitting by designation. (sa)

May 29 Orders granting the mot. which has been treated as a pet. for review for further relief with respect to this Ct's prior dec. in *United Steelworkers v. Aucher*, 763 F.2d 728 (3d Cir. 1985) and the Sec. is directed, within 60 days frm. the date of this order to publish in the Fed. Register a hazard communication standard applicable to all wrks. covd. by the OS & H Act of 1970, including those which have not been cvd. in the hazard communication standard as presently written, or a statement of reasons why, on the basis of

DATE	FILINGS–PROCEEDINGS
	the present administrative rec., a hazard communication standard is not feasible. Further ordering that if such a statement of reasons is fld. reasons shall be supplied separately as to each category of excluded workers. Denying at this time the petition insofar as petitioners seek to have the respondents held in contempt. (cvs 83-3554, etc.) (sa)
	* * * * *
Jul 23	Emergency Motion by Secretary of Labor to Stay Further Proceedings, filed. w/service. (cvs. 83-554, etc.) (ch)
	* * * * *
Aug 12	Order (*Gibbons*, Chief Judge and Fisher and Kelly, District Judges) denying Emergency mot. by Sec. of Labor to stay further proceedings. fld. (cvs 83-3554, etc.) (sa)
	* * * * *
Aug 31	Certified judgment in lieu of a formal mandate issued fld (cvs. 83-3554, etc.
	* * * * *
1988	
Apr. 6	Mot. by petitioners for further relief w/respect to prior dec. of this Ct. & points and authorities in support thereof. w/serv fld (cvs 83-3554 etc
Apr. 6	Mot. by petitioners to add James C. Miller III, Dir. Office of management and budget as respondent. (Covs. 83-3554, ect.) filed w/serv. (sa)

DATE	FILINGS–PROCEEDINGS
Aug. 10	Submitted on motion for further relief. Coram: Gibbons, Ch.J., Fisher & Kelly, DJ (covers 83-3554, 3561, 3565 & 84-3066, 3093 & 3128) (ab)
Aug. 19	Opinion of The Court (*Gibbons*, Chief Fisher* and Kelly* District Judges) sitting by designation. filed (cvs. 83-3554, etc.) (sa)
Aug. 19	Order (*Gibbons,* Chief Judge Fisher & Kelly, District Judges*) Denying mot for a stay of hazard communication standard pending resolution of pet. for review etc. Petition for review denied for the reasons set forth in opn. addressing the mot. of U.S. Steelworkers of America, etc. for further relief. filed (cvs 83-3554, etc.) *Sitting by designation. (sa)
Aug. 19	Order ordering & adjudging by this Ct. that Sec. shall forthwith publish in the Fed. Register a notice that those parts of the 8/24/87 hazard communication standard which were disapproved by Off. Management, are now effective. Denying petitioners' mot. to hold resp. officials of the Dept. of Labor in contempt since the instant dispute arose as the result of another Federal Agency's attempt to exceed its statutory authority. (cvs 83-3554, etc) fld
	* * * * *
Sept. 2	Petition for rehg. before the Court In Banc by respondent, John A. Pendergrass w/serv. filed (cvs. 83-3554, etc.) filed (sa)

DATE	FILINGS – PROCEEDINGS
Sept. 2	Petition for rehg. before the Court In Banc by Intervenor, United Technologies w/serv. filed (cvs. 83-3554, etc.) filed (sa)
	* * * * *
Nov. 28	Order (*Gibbons* Chief Judge Stapleton Mansmann Greenberg Hutchinson Scirica and Cowen Circuit Judges Fisher and Kelly District Judges*) denying the petition for rehg. by respondent before the Court In Banc (cvs. 83-3554, etc.) filed "As to panel rehg. only (sa)
Nov. 28	Order (*Gibbons*, Chief Judge Stapleton Mansmann Greenberg Hutchinson Scirica and Cowen Circuit Judges Fisher & Kelly District Judge*) denying the petition for rehg. by intervenor, United Technologies before the Ct. In Banc. (cvs. 83-3554, etc. filed "As to panel rehg. only (sa)
Dec. 5	Mot. by respondent Pendergrass to stay mandate to 1/5/89, w/serv. fld (cvs. 83-3554, etc.) as
Dec. 5	Mot. by Associated General Contractors counsel for petitioners to stay mandate w/serv. filed to 1-5-89 (cvs. 83-3554, etc. & 88-3345/8) sa
	* * * * *
1989	
Jan. 17	Copy of Supreme Court Order dated 1/13/89 by Justice Brennan ordering that the mandates of the U.S. Court of Appeals for the 3rd Cir. Nos. 83-3554, et al. and 88-3345, 88-3347 and 88-3348 set to issue 1-13-89 are

DATE	FILINGS – PROCEEDINGS
	hereby stayed pending receipt of responses to the applicaiton due on Monday 1-23-89 and further order of the undersigned or of the Ct. Filed (cvs. 83-3554, et al. 88-3345/8) sa
Jan. 17	Order (*Gibbons*, Chief Judge Scirica and Aldisert Cir. Judges) the mot. to stay the mandate is denied. The remaining pending mots. are moot. (cvs. 83-3554, et a 88-3345/8) filed (sa)
Jan. 30	Certified Copy of S.C. Order by Justice Brennan entered 1/13/89 staying U.S. Court of Appeals mandates is vacated & application in all respects is denied. Fld.S.C. Nos. 88-1070 & 88-1075 (cvs. 83-3554, et al. 88-3345, 88-3347/8) sa
Jan. 30	Certified judgment issued in lieu of a formal mandate (cvs. 83-3554, et al) sa

The Department of Labor's Hazard Communication Standard (29 C.F.R. 1910.1200)

§ 1910.1200 Hazard communication.

(a) *Purpose.* (1) The purpose of this section is to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees. This transmittal of information is to be accomplished by means of comprehensive hazard communication programs, which are to include container labeling and other forms of warning, material safety data sheets and employee training.

(2) This occupational safety and health standard is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to the subject. Evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, may include, for example, but is not limited to, provisions for: developing and maintaining a written hazard communication program for the workplace, including lists of hazardous chemicals present; labeling of containers of chemicals being shipped to other workplaces; preparation and distribution of material safety data sheets to employees and downstream employers; and development and implementation of employee training programs regarding hazards of chemicals and protective measures. Under section 18 of the Act, no state or political subdivision of a state may adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan.

(b) *Scope and application.* (1) This section requires chemical manufacturers or importers to assess the hazards of chemicals which they produce or import, and all employers to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program, labels and other forms of warning, material safety data sheets, and information and training. In addition, this section requires distributors to transmit the required information to employers.

(2) This section applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.

(3) This section applies to laboratories only as follows:

(i) Employers shall ensure that labels on incoming containers of hazardous chemicals are not removed or defaced;

(ii) Employers shall maintain any material safety data sheets that are received with incoming shipments of hazardous chemicals, and ensure that they are readily accessible to laboratory employees; and,

(iii) Employers shall ensure that laboratory employees are apprised of the hazards of the chemicals in their workplaces in accordance with paragraph (h) of this section.

(4) In work operations where employees only handle chemicals in sealed containers which are not opened under normal conditions of use (such as are found in marine cargo handling, warehousing, or retail sales), this section applies to these operations only as follows:

(i) Employers shall ensure that labels on incoming containers of hazardous chemicals are not removed or defaced;

(ii) Employers shall maintain copies of any material safety data sheets that are received with incoming ship-

ments of the sealed containers of hazardous chemicals, shall obtain a material safety data sheet for sealed containers of hazardous chemicals received without a material safety data sheet if an employee requests the material safety data sheet, and shall ensure that the material safety data sheets are readily accessible during each work shift to employees when they are in their work area(s); and,

(iii) Employers shall ensure that employees are provided with information and training in accordance with paragraph (h) of this section (except for the location and availability of the written hazard communication program under paragraph (h)(1)(iii)), to the extent necessary to protect them in the event of a spill or leak of a hazardous chemical from a sealed container.

(5) This section does not require labeling of the following chemicals:

(i) Any pesticide as such term is defined in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.), when subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Environmental Protection Agency;

(ii) Any food, food additive, color additive, drug, cosmetic, or medical or veterinary device, including materials intended for use as ingredients in such products (e.g. flavors and fragrances), as such terms are defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*) and regulations issued under that Act, when they are subject to the labeling requirements under that Act by the Food and Drug Administration;

(iii) Any distilled spirits (beverage alcohols), wine, or malt beverage intended for nonindustrial use, as such terms are defined in the Federal Alcohol Administration Act (27 U.S.C. 201 *et seq.*) and regulations issued under that Act, when subject to the labeling requirements of that

Act and labeling regulations issued under that Act by the Bureau of Alcohol Tobacco, and Firearms; and,

(iv) Any consumer product or hazardous substance as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 et seq.) and Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.) respectively, when subject to a consumer product safety standard or labeling requirement of those Acts, or regulations issued under those Acts by the Consumer Product Safety Commission.

(6) This section does not apply to:

(i) Any hazardous waste as such term is defined by the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6901 et seq.), when subject to regulations issued under that Act by the Environmental Protection Agency;

(ii) Tobacco or tobacco products;

(iii) Wood or wood products;

(iv) Articles;

(v) Food, drugs, cosmetics, or alcoholic beverages in a retail establishment which are packaged for sale to consumers;

(vi) Foods, drugs, or cosmetics intended for personal consumption by employees while in the workplace;

(vii) Any consumer product or hazardous substance, as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 *et seq.*) and Federal Hazardous Substances Act (15 U.S.C. 1261 *et seq.*) respectively, where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers; and,

(viii) Any drug, as that term is defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*),

when it is in solid, final form for direct administration to the patient (i.e. tablets or pills).

(c) *Definitions.*

"Article" means a manufactured item: (i) Which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which does not release, or otherwise result in exposure to, a hazardous chemical, under normal conditions of use.

"Assistant Secretary" means the Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, or designee.

"Chemical" means any element, chemical compound or mixture of elements and/or compounds.

"Chemical manufacturer" means an employer with a workplace where chemical(s) are produced for use or distribution.

"Chemical name" means the scientific designation of a chemical in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry (IUPAC) or the Chemical Abstracts Service (CAS) rules of nomenclature, or a name which will clearly identify the chemical for the purpose of conducting a hazard evaluation.

"Combustible liquid" means any liquid having a flashpoint at or above 100°F (37.8°C), but below 200°F (93.3°C), except any mixture having components with flashpoints of 200°F (93.3°C), or higher, the total volume of which make up 99 percent or more of the total volume of the mixture.

"Common name" means any designation or identification such as code name, code number, trade name, brand name or generic name used to identify a chemical other than by its chemical name.

"Compressed gas" means:

(i) A gas or mixture of gases having, in a container, an absolute pressure exceeding 40 psi at 70°F (21.1°C); or

(ii) a gas or mixture of gases having, in a container, an absolute pressure exceeding 104 psi at 130°F (54.4°C) regardless of the pressure at 70°F) 21.1°C); or

(iii) A liquid having a vapor pressure exceeding 40 psi at 100°F (37.8°C) as determined by ASTM D-323-72.

"Container" means any bag, barrel, bottle, box, can, cylinder, drum, reaction vessel, storage tank, or the like that contains a hazardous chemical. For purposes of this section, pipes or piping systems, and engines, fuel tanks, or other operating systems in a vehicle, are not considered to be containers.

"Designated representative" means any individual or organization to whom an employee gives written authorization to exercise such employee's rights under this section. A recognized or certified collective bargaining agent shall be treated automatically as a designated representative without regard to written employee authorization.

"Director" means the Director, National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services, or designee.

"Distributor" means a business, other than a chemical manufacturer or importer, which supplies hazardous chemicals to other distributors or to employers.

"Employee" means a worker who may be exposed to hazardous chemicals under normal operating conditions or in foreseeable emergencies. Workers such as office workers or bank tellers who encounter hazardous chemicals only in non-routine, isolated instances are not covered.

"Employer" means a person engaged in a business where chemicals are either used, distributed, or are produced for use or distribution, including a contractor or subcontractor.

"Explosive" means a chemical that causes a sudden, almost instantaneous release of pressure, gas, and heat when subjected to sudden shock, pressure, or high temperature.

"Exposure" or "exposed" means that an employee is subjected to a hazardous chemical in the course of employment through any route of entry (inhalation, ingestion, skin contact or absorption, etc.), and includes potential (e.g. accidental or possible) exposure.

"Flammable" means a chemical that falls into one of the following categories:

(i) "Aerosol, flammable" means an aerosol that, when tested by the method described in 16 CFR 1500.45, yields a flame projection exceeding 18 inches at full valve opening, or a flashback (a flame extending back to the valve) at any degree of valve opening;

(ii) "Gas, flammable" means:

(A) A gas that, at ambient temperature and pressure, forms a flammable mixture with air at a concentration of thirteen (13) percent by volume or less; or

(B) A gas that, at ambient temperature and pressure, forms a range of flammable mixtures with air wider than twelve (12) percent by volume, regardless of the lower limit;

(iii) "Liquid, flammable" means any liquid having a flashpoint below 100°F (37.8°C), except any mixture having components with flashpoints of 100°F (37.8°C) or higher, the total of which make up 99 percent or more of the total volume of the mixture;

(iv) "Solid, flammable" means a solid, other than a blasting agent or explosive as defined in § 190.109(a), that is liable to cause fire through friction, absorption of moisture, spontaneous chemical change, or retained heat from manufacturing or processing, or which can be ignited readily and when ignited burns so vigorously and

persistently as to create a serious hazard. A chemical shall be considered to be a flammable solid if, when tested by the method described in 16 CFR 1500.44, it ignites and burns with a self-sustained flame at a rate greater than one-tenth of an inch per second along its major axis.

"Flashpoint" means the minimum temperature at which a liquid gives off a vapor in sufficient concentration to ignite when tested as follows:

(i) Tagliabue Closed Tester (See American National Standard Method of Test for Flash Point by Tag Closed Tester, Z11.24-1979 (ASTM D 56-79)) for liquids with a viscosity of less than 45 Saybolt University Seconds (SUS) at 100°F (37.8°C), that do not contain suspended solids and do not have a tendency to form a surface film under test; or

(ii) Pensky-Martens Closed Tester (See American National Standard Method of Test for Flash Point by Pensky-Martens Closed Tester, Z11.7-1979 (ASTM D 93-79)) for liquids with a viscosity equal to or greater than 45 SUS at 100°F (37.8°C), or that contain suspended solids, or that have a tendency to form a surface film under test; or

(iii) Setaflash Closed Tester (see American National Standard Method of Test for Flash Point by Setaflash Closed Tester (ASTMD 3278-78))

Organic peroxides, which undergo autoaccelerating thermal decomposition, are excluded from any of the flashpoint determination methods specified above.

"Foreseeable emergency" means any potential occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which could result in an uncontrolled release of a hazardous chemical into the workplace.

"Hazardous chemical" means any chemical which is a physical hazard or a health hazard.

"Hazard warning" means any words, pictures, symbols, or combination thereof appearing on a label or other appropriate form of warning which convey the hazard(s) of the chemical(s) in the container(s).

"Health hazard" means a chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees. The term "health hazard" includes chemicals which are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers, hepatotoxins, nephrotoxins, neurotoxins, agents which act on the hematopoietic system, and agents which damage the lungs, skin, eyes, or mucous membranes. Appendix A provides further definitions and explanations of the scope of health hazards covered by this section, and Appendix B describes the criteria to be used to determine whether or not a chemical is to be considered hazardous for purposes of this standard.

"Identity" means any chemical or common name which is indicated on the material safety data sheet (MSDS) for the chemical. The identity used shall permit cross-references to be made among the required list of hazardous chemicals, the label and the MSDS.

"Immediate use" means that the hazardous chemical will be under the control of and used only by the person who transfers it from a labeled container and only within the work shift in which it is transferred.

"Importer" means the first business with employees within the Customs Territory of the United States which receives hazardous chemicals produced in other countries for the purpose of supplying them to distributors or employers within the United States.

"Label" means any written, printed, or graphic material, displayed on or affixed to containers of hazardous chemicals.

"Material safety data sheet (MSDS)" means written or printed material concerning a hazardous chemical which is prepared in accordance with paragraph (g) of this section.

"Mixture" means any combination of two or more chemicals if the combination is not, in whole or in part, the result of a chemical reaction.

"Organic peroxide" means an organic compound that contains the bivalent -O-O-structure and which may be considered to be a structural derivative of hydrogen peroxide where one or both of the hydrogen atoms has been replaced by an organic radical.

"Oxidizer" means a chemical other than a blasting agent or explosive as defined in § 1910.109(a), that initiates or promotes combustion in other materials, thereby causing fire either of itself or through the release of oxygen or other gases.

"Physical hazard" means a chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive.

"Produce" means to manufacture, process, formulate, or repackage.

"Pyrophoric" means a chemical that will ignite spontaneously in air at a temperature of 130°F (54.4°C) or below.

"Responsible party" means someone who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary.

"Specific chemical identity" means the chemical name, Chemical Abstracts Service (CAS) Registry Number, or

any other information that reveals the precise chemical designaton of the substance.

"Trade secret" means any confidential formula, pattern, process, device, information or compilation of information that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it. Appendix D sets out the criteria to be used in evaluating trade secrets.

"Unstable (reactive)" means a chemical which in the pure state, or as produced or transported, will vigorously polymerize, decompose, condense, or will become self-reactive under conditions of shocks, pressure or temperature.

"Use" means to package, handle, react, or transfer.

"Water-reactive" means a chemical that reacts with water to release a gas that is either flammable or presents a health hazard.

"Work area" means a room or defined space in a workplace where hazardous chemicals are produced or used, and where employees are present.

"Workplace" means an establishment, job site, or project, at one geographical location containing one or more work areas.

(d) *Hazard determination.* (1) Chemical manufacturers and importers shall evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous. Employers are not required to evaluate chemicals unless they choose not to rely on the evaluation performed by the chemical manufacturer or importer for the chemical to satisfy this requirement.

(2) Chemical manufacturers, importers or employers evaluating chemicals shall identify and consider the available scientific evidence concerning such hazards. For health hazards, evidence which is statistically significant and which is based on at least one positive study con-

ducted in accordance with established scientific principles is considered to be sufficient to establish a hazardous effect if the results of the study meet the definitions of health hazards in this section. Appendix A shall be consulted for the scope of health hazards covered, and Appendix B shall be consulted for the criteria to be followed with respect to the completeness of the evaluation, and the data to be reported.

(3) The chemical manufacturer, importer or employer evaluating chemicals shall treat the following sources as establishing that the chemicals listed in them are hazardous:

(i) 29 CFR Part 1910, Subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration (OSHA); or,

(ii) *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment,* American Conference of Governmental Industrial Hygienists (ACGIH) (latest edition).

The chemical manufacturer, importer, or employer is still responsible for evaluating the hazards associated with the chemicals in these source lists in accordance with the requirements of this standard.

(4) Chemical manufacturers, importers and employers evaluating chemicals shall treat the following sources as establishing that a chemical is a carcinogen or potential carcinogen for hazard communication purposes:

(i) National Toxicology Program (NTP), *Annual Report on Carcinogens* (latest edition);

(ii) International Agency for Research on Cancer (IARC) *Monographs* (latest editions); or

(iii) 29 CFR Part 1910, Subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration.

Note: The *Registry of Toxic Effects of Chemical Substances* published by the National Institute for Occupational Safety and Health indicates whether a chemical has been found by NTP or IARC to be a potential carcinogen.

(5) The chemical manufacturer, importer or employer shall determine the hazards of mixtures of chemicals as follows:

(i) If a mixture has been tested as a whole to determine its hazards, the results of such testing shall be used to determine whether the mixture is hazardous;

(ii) If a mixture has not been tested as a whole to determine whether the mixture is a health hazard, the mixture shall be assumed to present the same health hazards as do the components which comprise one percent (by weight or volume) or greater of the mixture, except that the mixture shall be assumed to present a carcinogenic hazard if it contains a component in concentrations of 0.1 percent or greater which is considered to be a carcinogen under paragraph (d)(4) of this section;

(iii) If a mixture has not been tested as a whole to determine whether the mixture is a physical hazard; the chemical manufacturer, importer, or employer may use whatever scientifically valid data is available to evaluate the physical hazard potential of the mixture; and;

(iv) If the chemical manufacturer, importer, or employer has evidence to indicate that a component present in the mixture in concentrations of less than one percent (or in the case of carcinogens, less than 0.1 percent) could be released in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH Threshold Limit Value, or could present a health hazard to employees in those concentrations, the mixture shall be assumed to present the same hazard.

(6) Chemical manufacturers, importers, or employers evaluating chemicals shall describe in writing the procedures they use to determine the hazards of the chemical they evaluate. The written procedures are to be made available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director. The written description may be incorporated into the written hazard communication program required under paragraph (e) of this section.

(e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at the work place, a written hazard communication program for their workplaces which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:

(i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and,

(ii) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

(2) *Multi-employer workplaces.* Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example, employees of a construction contractor working on-site) shall additionally ensure that the hazard communication programs developed and implemented under this paragraph (e) include the following:

(i) The methods the employer will use to provide the other employer(s) with a copy of the material safety data

sheet, or to make it available at a central location in the workplace, for each hazardous chemical the other employer(s)' employees may be exposed to while working;

(ii) The methods the employer will use to inform the other employer(s) of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies; and,

(iii) The methods the employer will use to inform the other employer(s) of the labeling system used in the workplace.

(3) The employer may rely on an existing hazard communication program to comply with these requirements, provided that it meets the criteria established in this paragraph (e).

(4) The employer shall make the written hazard communication program available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director, in accordance with the requirements of 29 CFR 1910.20(e).

(f) *Labels and other forms of warning.* (1) The chemical manufacturer, importer, or distributor shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following information:

(i) Identity of the hazardous chemical(s);

(ii) Appropriate hazard warnings; and

(iii) Name and address of the chemical manufacturer, importer, or other responsible party.

(2) For solid metal (such as a steel beam or a metal casting) that is not exempted as an article due to its downstream use, the required label may be transmitted to the customer at the time of the initial shipment, and need not be included with subsequent shipments to the same employer unless the information on the label changes. The

label may be transmitted with the initial shipment itself, or with the material safety data sheet that is to be provided prior to or at the time of the first shipment. This exception to requiring labels on every container of hazardous chemicals is only for the solid metal itself and does not apply to hazardous chemicals used in conjunction with, or known to be present with, the metal and to which employees handling the metal may be exposed (for example, cutting fluids or lubricants).

(3) Chemical manufacturers, importers, or distributors shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged, or marked in accordance with this section in a manner which does not conflict with the requirements of the Hazardous Materials Transportation Act (49 U.S.C. 1801 *et seq.*) and regulations issued under that Act by the Department of Transportation.

(4) If the hazardous chemical is regulated by OSHA in a substance-specific health standard, the chemical manufacturer, importer, distributor or employer shall ensure that the labels or other forms of warning used are in accordance with the requirements of that standard.

(5) Except as provided in paragraphs (f)(6) and (f)(7) the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:

(i) Identity of the hazardous chemical(s) contained therein; and

(ii) Appropriate hazard warnings.

(6) The employer may use signs, placards, process sheets, batch tickets, operating procedures, or other such written materials in lieu of affixing labels to individual stationary process containers, as long as the alternative method identifies the containers to which it is applicable and conveys the information required by paragraph (f)(5)

of this section to be on a label. The written materials shall be readily accessible to the employees in their work area throughout each work shift.

(7) The employer is not required to label portable containers into which hazardous chemicals are transferred from labeled containers, and which are intended only for the immediate use of the employee who performs the transfer.

(8) The employer shall not remove or deface existing labels on incoming containers of hazardous chemicals, unless the container is immediately marked with the required information.

(9) The employer shall ensure that labels or other forms of warning are legible, in English, and prominently displayed on the container, or readily available in the work area throughout each work shift. Employers having employees who speak other languages may add the information in their language to the material presented, as long as the information is presented in English as well.

(10) The chemical manufacturer, importer, distributor or employer need not affix new labels to comply with this section if existing labels already convey the required information.

(g) *Material safety data sheets.* (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet for each hazardous chemical which they use.

(2) Each material safety data sheet shall be in English and shall contain at least the following information:

(i) The identity used on the label, and, except as provided for in paragraph (i) of this section on trade secrets:

(A) If the hazardous chemical is a single substance, its chemical and common name(s);

(B) If the hazardous chemical is a mixture which has been tested as a whole to determine its hazards, the chemical and common name(s) of the ingredients which contribute to these known hazards, and the common name(s) of the mixture itself; or,

(C) If the hazardous chemical is a mixture which has not been tested as a whole:

(*1*) The chemical and common name(s) of all ingredients which have been determined to be health hazards, and which comprise 1% or greater of the composition, except that chemicals identified as carcinogens under paragraph (d)(4) of this section shall be listed if the concentrations are 0.1% or greater; and,

(*2*) The chemical and common name(s) of all ingredients which have been determined to be health hazards, and which comprise less than 1% (0.1% for carcinogens) of the mixture, if there is evidence that the ingredient(s) could be released from the mixture in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH Threshold Limit Value, or could present a health hazard to employees; and,

(*3*) The chemical and common name(s) of all ingredients which have been determined to present a physical hazard when present in the mixture;

(ii) Physical and chemical characteristics of the hazardous chemical (such as vapor pressure, flash point);

(iii) The physical hazards of the hazardous chemical, including the potential for fire, explosion, and reactivity;

(iv) The health hazards of the hazardous chemical, including signs and symptoms of exposre, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical;

(v) The primary route(s) of entry;

(vi) The OSHA permissible exposure limit, ACGIH Threshold Limit Value, and any other exposure limit used

or recommended by the chemical manufacturer, importer, or employer preparing the material safety data sheet, where available;

(vii) Whether the hazardous chemical is listed in the National Toxicology Program (NTP) *Annual Report on Carcinogens* (latest edition) or has been found to be a potential carcinogen in the International Agency for Research on Cancer (IARC) *Monographs* (latest editions), or by OSHA;

(viii) Any generally applicable precautions for safe handling and use which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, including appropriate hygienic practices, protective measures during repair and maintenance of contaminated equipment, and procedures for clean-up of spills and leaks;

(ix) Any generally applicable control measures which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, such as appropriate engineering controls, work practices, or personal protective equipment;

(x) Emergency and first aid procedures;

(xi) The date of preparation of the material safety data sheet or the last change to it; and,

(xii) The name, address and telephone number of the chemical manufacturer, importer, employer or other responsible party preparing or distributing the material safety data sheet, who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary.

(3) If no relevant information is found for any given category on the material safety data sheet, the chemical manufacturer, importer or employer preparing the material safety data sheet shall mark it to indicate that no applicable information was found.

(4) Where complex mixtures have similar hazards and contents (i.e. the chemical ingredients are essentially the same, but the specific composition varies from mixture to mixture), the chemical manufacturer, importer or employer may prepare one material safety data sheet to apply to all of these similar mixtures.

(5) The chemical manufacturer, importer or employer preparing the material safety data sheet shall ensure that the information recorded accurately reflects the scientific evidence used in making the hazard determination. If the chemical manufacturer, importer or employer preparing the material safety data sheet becomes newly aware of any significant information regarding the hazards of a chemical, or ways to protect against the hazards, this new information shall be added to the material safety data sheet within three months. If the chemical is not currently being produced or imported the chemical manufacturer or importer shall add the information to the material safety data sheet before the chemical is introduced into the workplace again.

(6) Chemical manufacturers or importers shall ensure that distributors and employers are provided an appropriate material safety data sheet with their initial shipment, and with the first shipment after a material safety data sheet is updated. The chemical manufacturer or importer shall either provide material safety data sheets with the shipped containers or send them to the employer prior to or at the time of the shipment. If the material safety data sheet is not provided with a shipment that has been labeled as a hazardous chemical, the employer shall obtain one from the chemical manufacturer, importer, or distributor as soon as possible.

(7) Distributors shall ensure that material safety data sheets, and updated information, are provided to other distributors and employers. Retail distributors which sell

hazardous chemicals to commercial customers shall provide a material safety data sheet to such employers upon request, and shall post a sign or otherwise inform them that a material safety data sheet is available. Chemical manufacturers, importers, and distributors need not provide material safety data sheets to retail distributors which have informed them that the retail distributor does not sell the product to commercial customers or open the sealed container to use it in their own workplaces.

(8) The employer shall maintain copies of the required material safety data sheets for each hazardous chemical in the workplace, and shall ensure that they are readily accessible during each work shift to employees when they are in the their work area(s).

(9) Where employees must travel between workplaces during a workshift, *i.e.*, their work is carried out at more than one geographical location, the material safety data sheets may be kept at a central location at the primary workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency.

(10) Material safety data sheets may be kept in any form, including operating procedures, and may be designed to cover groups of hazardous chemicals in a work area where it may be more appropriate to address the hazards of a process rather than individual hazardous chemicals. However, the employer shall ensure that in all cases the required information is provided for each hazardous chemical, and is readily accessible during each work shift to employees when they are in in their work area(s).

(11) Material safety data sheets shall also be made readily available, upon request, to designated representatives and to the Assistant Secretary, in accordance with the requirements of 29 CFR 1910.20 (e). The Director shall

also be given access to material safety data sheets in the same manner.

(h) *Employee information and training.* Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

(1) *Information.* Employees shall be informed of:

(i) The requirements of this section;

(ii) Any operations in their work area where hazardous chemicals are present; and,

(iii) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.

(2) *Training.* Employee training shall include at least:

(i) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);

(ii) The physical and health hazards of the chemicals in the work area;

(iii) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and,

(iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

(i) *Trade secrets.* (1) The chemical manufacturer, importer, or employer may withhold the specific chemical identity, including the chemical name and other specific identification of a hazardous chemical, from the material safety data sheet, provided that:

(i) The claim that the information withheld is a trade secret can be supported;

(ii) Information contained in the material safety data sheet concerning the properties and effects of the hazardous chemical is disclosed;

(iii) The material safety data sheet indicates that the specific chemical identity is being withheld as a trade secret; and,

(iv) The specific chemical identity is made available to health professionals, employees, and designated representatives in accordance with the applicable provisions of this paragraph.

(2) Where a treating physician or nurse determines that a medical emergency exists and the specific chemical identity of a hazardous chemical is necessary for emergency or first-aid treatment, the chemical manufacturer, importer, or employer shall immediately disclose the specific chemical identity of a trade secret chemical to that treating physician or nurse, regardless of the existence of a written statement of need of a confidentiality agreement. The chemical manufacturer, importer, or employer may require a written statement of need and confidentiality agreement, in accordance with the provisions of paragraphs (i)(3) and (4) of this section, as soon as circumstances permit.

(3) In non-emergency situations, a chemical manufacturer, importer, or employer shall, upon request, disclose a specific chemical identity, otherwise permitted to be withheld under paragraph (i)(1) of this section, to a health professional (i.e. physician, industrial hygienist,

toxicologist, epidemiologist, or occupational health nurse) providing medical or other occupational health services to exposed employee(s), and to employees or designated representatives, if:

(i) The request is in writing;

(ii) The request describes with reasonable detail one or more of the following occupational health needs for the information:

(A) To assess the hazards of the chemicals to which employees will be exposed;

(B) To conduct or assess sampling of the workplace atmosphere to determine employee exposure levels;

(C) To conduct pre-assignment or periodic medical surveillance of exposed employees;

(D) To provide medical treatment to exposed employees;

(E) To select or assess appropriate personal protective equipment for exposed employees;

(F) To design or assess engineering controls or other protective measures for exposed employees; and,

(G) To conduct studies to determine the health effects of exposure.

(iii) The request explains in detail why the disclosure of the specific chemical identity is essential and that, in lieu thereof, the disclosure of the following information to the health professional, employee, or designated representative, would not satisfy the purposes described in paragraph (i)(3)(ii) of this section:

(A) The properties and effects of the chemical;

(B) Measures for controlling workers' exposure to the chemical;

(C) Methods of monitoring and analyzing worker exposure to the chemical; and,

(D) Methods of diagnosing and treating harmful exposures to the chemical;

(iv) The request includes a description of the procedures to be used to maintain the confidentiality of the disclosed information; and,

(v) The health professional, and the employer or contractor of the services of the health professional (i.e. downstream employer, labor organization, or individual employee), employee, or designated representative, agree in a written confidentiality agreement that the health professional, employee, or designated representative, will not use the trade secret information for any purpose other than the health need(s) asserted and agree not to release the information under any circumstances other than to OSHA, as provided in paragraph (i)(6) of this section, except as authorized by the terms of the agreement or by the chemical manufacturer, importer, or employer.

(4) The confidentiality agreement authorized by paragraph (i)(3)(iv) of this section:

(i) May restrict the use of the information to the health purposes indicated in the written statement of need;

(ii) May provide for appropriate legal remedies in the event of a breach of the agreement, including stipulation of a reasonable pre-estimate of likely damages; and,

(iii) May not include requirements for the posting of a penalty bond.

(5) Nothing in this standard is meant to preclude the parties from pursuing non-contractual remedies to the extent permitted by law.

(6) If the health professional, employee, or designated representative receiving the trade secret information decides that there is a need to disclose it to OSHA, the chemical manufacturer, importer, or employer who provided the information shall be informed by the health professional, employee, or designated representative prior to, or at the same time as, such disclosure.

(7) If the chemical manufacturer, importer, or employer denies a written request for disclosure of a specific chemical identity, the denial must:

(i) By provided to the health professional, employee, or designated representative, within thirty days of the request;

(ii) Be in writing;

(iii) Include evidence to support the claim that the specific chemical identity is a trade secret;

(iv) State the specific reasons why the request is being denied; and,

(v) Explain in detail how alternative information may satisfy the specific medical or occupational health need without revealing the specific chemical identity.

(8) The health professional, employee, or designated representative whose request for information is denied under paragraph (i)(3) of this section may refer the request and the written denial of the request to OSHA for consideration.

(9) When a health professional, employee, or designated representative refers the denial to OSHA under paragraph (i)(8) of this section, OSHA shall consider the evidence to determine if:

(i) The chemical manufacturer, importer, or employer has supported the claim that the specific chemical identity is a trade secret;

(ii) The health professional, employee, or designated representative has supported the claim that there is a medical or occupational health need for the information; and,

(iii) The health professional, employee, or designated representative has demonstrated adequate means to protect the confidentiality.

(10)(i) If OSHA determines that the specific chemical identity requested under paragraph (i)(3) of this section is

not a *bona fide* trade secret, or that it is a trade secret, but the requesting health professional, employee, or designated representative has a legitimate medical or occupational health need for the information, has executed a written confidentiality agreement, and has shown adequate means to protect the confidentiality of the information, the chemical manufacturer, importer, or employer will be subject to citation by OSHA.

(ii) If a chemical manufacturer, importer, or employer demonstrates to OSHA that the execution of a confidentiality agreement would not provide sufficient protection against the potential harm from the unauthorized disclosure of a trade secret specific chemical identity, the Assistant Secretary may issue such orders or impose such additional limitations or conditions upon the disclosure of the requested chemical information as may be appropriate to assure that the occupational health services are provided without an undue risk of harm to the chemical manufacturer, importer, or employer.

(11) If a citation for a failure to release specific chemical identity information is contested by the chemical manufacturer, importer, or employer, the matter will be adjudicated before the Occupational Safety and Health Review Commission in accordance with the Act's enforcement scheme and the applicable Commission rules of procedure. In accordance with the Commission rules, when a chemical manufacturer, importer, or employer continues to withhold the information during the contest, the Administrative Law Judge may review the citation and supporting documentation *in camera* or issue appropriate orders to protect the confidentiality or such matters.

(12) Notwithstanding the existence of a trade secret claim, a chemical manufacturer, importer, or employer shall, upon request, disclose to the Assistant Secretary any information which this section requires the chemical

manufacturer, importer, or employer to make available. Where there is a trade secret claim, such claim shall be made no later than at the time the information is provided to the Assistant Secretary so that suitable determinations of trade secret status can be made and the necessary protections can be implemented.

(13) Nothing in this paragraph shall be construed as requiring the disclosure under any circumstances of process or percentage of mixture information which is a trade secret.

(j) *Effective dates.* (1) Chemical manufacturers, importers, and distributors shall ensure that material safety data sheets are provided with the next shipment of hazardous chemicals to employers after September 23, 1987.

(2) Employers in the non-manufacturing sector shall be in compliance with all provisions of this section by May 23, 1988. (Note: Employers in the manufacturing sector (SIC Codes 20 through 39) are already required to be in compliance with this section.)

Excerpts From "Hazard Communication: Notice of Proposed Rulemaking" (47 Fed. Reg. 12,092 (Mar. 19, 1982))

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. H-022]

Hazard Communication; Notice of Proposed Rulemaking and Public Hearings

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Notice of proposed rulemaking and public hearings.

SUMMARY: The proposed standard requires chemical manufacturers to assess the hazards of chemicals which they produce, and all employers having facilities in the manufacturing division, SIC Codes 20-39, to provide information to their employees about these hazards by means of hazard communication programs including labels, placards, material safety data sheets, information and training, and access to written records. OSHA has determined that this standard is necessary because many employers and employees are not aware of the presence of hazardous chemicals in their workplaces. The proposed standard provides for hazard determinations to be conducted to identify these hazards, and for subsequent communication to employees of the hazards thus identified. These activities should serve to alleviate the lack of awareness concerning hazardous chemicals, and should provide an impetus for employees and employers to devise better means of protection from these hazards. Public hearings are being scheduled to provide interested parties

the opportunity to orally present information and data related to the issues raised by this proposed rule.

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[T]he current proposal substantially reduces the documentation necessary on hazard evaluation procedures as well as other recordkeeping requirements. As a result, the initial recordkeeping cost is lowered from $31.35 million projected for the January proposal to $14.7 million under the current proposal. The annual cost of recordkeeping likewise falls from $4.69 million to $2.07 million. This provision—together with more limited labeling and the elimination of "no hazard" certifications, information sheets, and labeling requirements on pipes and support systems—significantly reduces the paperwork burden imposed by the January proposal and meets the intent of the Paperwork Reduction Act of 1980.

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Excerpts From "Hazard Communication: Final Rule"
(48 Fed. Reg. 53,280 (Nov. 25, 1983))

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

Hazard Communication

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final rule.

SUMMARY: OSHA is hereby promulgating a final occupational safety and health standard entitled "Hazard Communication" (29 CFR 1910.1200). The standard requires chemical manufacturers and importers to assess the hazards of chemicals which they produce or import, and all employers having workplaces in the manufacturing division, Standard Industrial Classification (SIC] codes 20 through 39, to provide information to their employees concerning hazardous chemicals by means of hazard communication programs including labels, material safety data sheets, training, and access to written records. In addition, distributors of hazardous chemicals are required to ensure that containers they distribute are properly labeled, and that a material safety data sheet is provided to their customers in the manufacturing division SIC Codes.

Implementation of this final standard will reduce the incidence of chemically-related occupational illnesses and injuries in employees of the manufacturing division. Increased availability of hazard information will assist employers in these industries to devise appropriate protective measures, and will give employees the information they need to take steps to protect themselves.

The twenty-four states with their own OSHA-approved occupational safety and health plans must adopt a comparable standard within six months of this publication date. These states are: Alaska, Arizona, California, Connecticut (for state and local government employees only), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Until such time as a state standard is promulgated, Federal OSHA will provide interim enforcement assistance, as appropriate, in these states.

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SUPPLEMENTARY INFORMATION: The recordkeeping requirements in the standard have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980, Pub. L. 96-511, 44 U.S.C. 3501, *et seq.* The OMB approval number is 1218-0072.

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Excerpts From "Hazard Communication: Final Rule"
(52 Fed. Reg. 31,853 (Aug. 24, 1987))

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910, 1915, 1917, 1918, 1926, and 1928

[Docket No. H-0220]

Hazard Communication

AGENCY: Occupational Safety and Health Administration (OSHA); Labor.

ACTION: Final rule.

SUMMARY: OSHA is revising its Hazard Communication Standard (HCS) (29 CFR 1910.1200), which currently applies to the manufacturing sector, to cover all employers with employees exposed to hazardous chemicals in their workplaces. Expansion of the scope of the HCS requires non-manufacturing employers to establish hazard communication programs to transmit information on the hazards of chemicals to their employees by means of labels on containers, material safety data sheets, and training programs. This action will reduce the incidence of chemically-related occupational illnesses and injuries in non-manufacturing workplaces.

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Labeling exemptions. The HCS includes a number of labeling exemptions to ensure that OSHA does not provide duplicative coverage for products which are already labeled under the rules of another Federal agency. It should be reemphasized that these exemptions (in paragraph (b)(4) of the original rule; paragraph (b)(5) in this final rule) are only from the container labeling requirements under paragraph (f)—all other provisions of

the rule are still in effect. A minor correction is being made, however, to these exemptions to indicate that when medical or veterinary devices are labeled in accordance with the labeling requirements of the Food and Drug Administration (FDA) under authority of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*), those items are exempted from HCS labeling requirements. All other items regulated by FDA under that Act were listed in the HCS labeling exemption. Medical and veterinary devices were inadvertently omitted from the list of items that might be subject to FDA labeling requirements under the Federal Food, Drug, and Cosmetic Act, and they are exempted from HCS labels for the same reasons that the other items are exempt when subject to labeling under FDA. *See* 48 FR 53289. To ensure that all these FDA regulated items are treated in the same manner and that devices are exempted from HCS labeling if subject to FDA labeling, paragraph (b)(5)(ii) is amended by adding medical and veterinary devices.

Other exemptions. The HCS includes a number of specific, total exemptions from the requirements of the rule for certain types of chemicals. This rule adds three categories of exemptions: food, drugs, cosmetics, or alcoholic beverages in a retail establishment packaged for retail sale (paragraph (b)(6)(vi); consumer products (paragraph (b)(6)(vii)); and certain pharmaceuticals (paragraph (b)(6)(viii)).

Food, drugs, cosmetics, alcoholic beverages. The current HCS includes an exemption for food, drugs, or cosmetics brought into the workplace for employee consumption. These types of exposures are not related to an employee's work, and therefore do not need to be covered under the HCS.

The expansion of the HCS into the non-manufacturing sector will result in many of these types of products being

present in workplaces (*e.g.*, liquor stores) where they are not intended for employee consumption, and where they normally would not result in employee exposure because they are packaged for sale to consumers. Although some of these products may meet the definition of a "hazardous chemical" (*e.g.*, vinegar is acetic acid), when packaged for retail sale they do not pose a hazard to workers that is any different than the hazards of such products in their homes. The label information required by other Federal agencies for foods, drugs, cosmetics, and alcoholic beverages should thus provide sufficient protection for workers, and OSHA has exempted these products from coverage under the rule. It should be noted that this is not an exemption for facilities of any particular industry, as all facilities may have other chemicals in use that would be covered by the HCS. In addition, since these products are exempted, employers which package them for retail sale would not have to furnish materal safety data sheets to distributors receiving the products.

Consumer products. The current rule provides a labeling exemption for consumer products when they are labeled in accordance with the requirements of the Consumer Product Safety Commission (CPSC). CPSC requires consumer products which contain hazardous substance to be appropriately labeled. Examples of consumer products would include such items as oven cleaner, paint stripper, and adhesive, which may be found in various types of workplaces. In addition to the specific labeling exemption, OSHA has been interpreting the rule as not being applicable to consumer products when used as a consumer would use them. OSHA is now adding this interpretation to the rule itself, paragraph (b)(6)(vi), stating that where such consumer products are used in the workplace in a a manner comparable to normal conditions of consumer use, resulting in a duration and frequency of exposure to employees which is no greater than exposures experienced

by ordinary consumers, under such conditions the chemical would not have to be included in the employer's hazard communication program. This position is consistent with OSHA's reason for orginally limiting the exemption for hazardous consumer products used in the course of employment to only an exemption from HCS labeling, and not material safety data sheet and training requirements. "OSHA recognizes . . . that there may be situations where worker exposure is significantly greater than that of consumers, and that under these circumstances, substances which are safe for contemplated consumer use may pose unique hazards in the workplace." 48 FR 53289. However, to the extent that workers are exposed to the substances in a manner similar to that of the general public, there is no need for any HCS requirements.

One example of such a differentiation in exposure situations involves the use of abrasive cleaners in the workplace. Where these are used intermittently to clean a sink, much as they would be used at home, the cleaners would not be covered under the standard. But if they are used to clean out reactor vessels, thus resulting in a much greater level of exposure, they would be covered. Or if an employee cleans sinks all day long, thus resulting in more frequent exposures, the abrasive would also be included in the hazard communication program. Thus workplaces which only have chemicals which are consumer products used in the same way and as frequently as the general public would normally use them, would not have to have a hazard communication program.

It should be noted that OSHA intends to read this exemption narrowly. Where an employer is uncertain whether the duration and frequency of exposure in these products is comparable to consumer use, an employer should obtain or develop the material safety data sheet and make it available to employees.

In response to questions raised in the 1985 ANPR. OSHA received a few comments on the use of consumer products in the non-manufacturing sector. A number indicated that overexposure may occur from the use of such products, or that the frequency and duration of workplace exposure is typically greater than that experienced by consumers (Exs. 2-59, 2-83, 2-100, 2-120, and 2-164). Others stated that the exposure was comparable to consumer use (Exs. 2-46 and 2-63). There were several that felt the label provided enough information, and no additional requirements were needed to protect employees (Exs. 2-75, 2-79, 2-99, 2-107, and 2-116), while others felt the employer should be required to request material safety data sheets because employees are not getting enough information (Exs. 2-109, 2-128, and 2-169). One suggested that the label note that a material safety data sheet is available on request (Ex. 2-100), while another contended that when a product is used by a professional, it is no longer a consumer product (Ex. 2-199). OSHA believes that the consumer product exemption in this final rule takes all of these concerns into consideration, and strikes a balance between the practical consideration of acquiring and maintaining material safety data sheets on CPSC regulated products which employees are exposed to at home as well as at work, and the worker's need for more hazard information than a CPSC label when exposures are greater or more frequent than typical public use of the chemical would generate.

A number of States adopting right-to-work laws have also developed consumer product exemptions. (*See, e.g.*, Wisconsin "Employees' Right to Know Law"; Illinois "Toxic Substances Disclosure to Employees Act.") However, most of these rules have taken a broader approach to the consumer product exemption, generally eliminating coverage of such products unless exposure is

"significantly greater" than consumer exposure during the "principal consumer use." OSHA considered and rejected such language for the consumer product exemption. It would be very difficult from an enforcement perspective to determine when exposure to a consumer product is "significantly greater" than consumer exposure. The key elements of concern to OSHA are as stated in the consumer product exemption included in this rule—that the consumer product be used in the same manner as a consumer would use it (and therefore as intended by the manufacturer when preparing the label information), and that the duration and frequency of exposure be essentially the same as would be experienced by a consumer (and thus the label warnings would provide adequate protection.) A broader exemption than this would not be appropriate to protect workers from occupational exposures that were not anticipated by the manufacturer when the labels, and thus the protective measures, were developed.

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Medicine. The rule, paragraph (b)(6)(vii), also includes an exemption for drugs when they are solid, and are in final form for direct administration to the patient (*i.e.*, pills or tablets). Employees handling such finished drug products would not be exposed to the chemicals involved, and would not need information other than that supplied on the container label under FDA requirements. (The State of North Carolina adopted a similar exemption in their Hazard Communication Standard, 13 NCAC s7C.101(a)(99)).

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(e) Written Hazard Communication Program

Under the current rule, a written hazard communication program must be developed and implemented for each

workplace. Since the current rule covers fixed manufacturing sites, it did not appear to be necessary to specifically state that the written program be available at the site. With expansion to non-manufacturing, however, particularly in the construction industry where a firm may have multiple sites, the standard must be tailored to specifically state that the intent is to maintain the written program at each site. Employees will then be able to access the information as required.

The current written hazard communication program requirements include a provision that requires manufacturing employers to provide hazard information to on-site contractor employers who have employees who may be exposed to the hazards generated by the manufacturer (current paragraph (e)(1)(iii)). The current standard does not address the reverse situation, *i.e.,* where a contractor employer brings hazardous materials on-site, and exposes the manufacturer's employees to them. Since the expanded rule will affect more worksites with work arrangements of this type (*e.g.,* construction), and the need for an exchange of hazard information is obvious, OSHA has revised the requirements to tailor it to address the multi-employer workplace. (This was suggested in comments submitted in response to the ANPR. *See* Ex. 2-225, comments from the National Constructors Association. In addition, this situation has also been addressed in existing State right-to-know laws. *See, e.g.,* Alabama Act 85-658; Tennessee "Hazardous Chemical Right to Know Law.")

Under these provisions (paragraph (e)(2)), the employers must exchange material safety data sheets, as well as information about precautionary measures necessary to protect employees and an indication of the type of labeling system in use, where exposures may occur to another employer's employees. Each employer will then have the information necessary to inform and train their

employees. This will help ensure that all employees have sufficient information to protect themselves in the workplace, regardless of which employer uses the hazardous chemical.

Consistent with the performance-orientation of the rule, the provisions do not specify how this coordination is to be accomplished. This is best left to the discretion of the parties involved. In many cases, it would probably be most efficient for the general contractor to coordinate the function. For example, the general contractor could keep and make available material safety data sheets in the office on the site.

It should be emphasized that the exchange of information is limited to those situations where exposures of other employers' employees may occur. Given the nature of multi-employer work sites in construction, there would be many situations where subcontractors responsible for various phases of the building project would not have employees present during other phases and thus no such exchange would be required. For example, if the electricians are not working near, or at the same time as, the paving contractor, then no interchange is required. But if a painting contractor's workers are using flammable solvents in an area where another subcontractor is welding pipes, this information exchange is vital to ensure proper protection of employees.

* * * * *

IV. Clearance of Information Collection Requirements

On March 31, 1983, the Office of Management and Budget (OMB) published a new 5 CFR Part 1320, implementing the information collection provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* (48 FR 13666). Part 1320, which became effective on

April 30, 1983, sets forth procedures for agencies to follow in obtaining OMB clearance for information collection requirements. The sections of the Hazard Communication Standard which may create recordkeeping requirements are paragraphs (d) hazard determination; (e) written hazard communication program; (f) labels and other appropriate forms of warning; (g) material safety data sheets; (h) information and training; and (i) trade secrets.

In accordance with the provisions of the Paperwork Reduction Act and the regulations issued pursuant thereto, OSHA certifies that it has submitted the information collection requirements contained in its rule on hazard communication to OMB for review under section 3504(h) of that Act.

* * * * *

Excerpts From "Hazard Communication: Notice of Proposed Rulemaking" (53 Fed. Reg. 29,822 (Aug. 8, 1988))

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910, 1915, 1917, 1918, and 1926

[Docket H-022D]

Hazard Communication

AGENCY: Occupational Safety and Health Administration (OSHA); Labor.

ACTION: Notice of proposed rulemaking (NPRM) and notice of public hearing.

SUMMARY: On August 24, 1987, OSHA published a final rule to modify its Hazard Communication Standard (HCS) (52 FR 31852). The original rule, which was promulgated on November 25, 1983, covered employees exposed to hazardous chemicals in the manufacturing sector of industry. The modified rule expanded coverage to all employees exposed to hazardous chemicals, thus providing protection for those in non-manufacturng employments as well as manufacturing.

The HCS requires employers to establish hazard communication programs to transmit information on the hazards of chemicals to their employees by means of labels on containers, material safety data sheets, and training programs. Implementation of these hazard communication programs will reduce the incidence of chemically-related occupational illnesses and injuries.

An advance notice of proposed rulemaking (ANPR) on expansion of the scope had been published on November 27, 1985 (50 FR 48794). OSHA was subsequently directed by the U.S. Court of Appeals for the Third Circuit to issue

a final standard to expand the scope of industries covered by the rule within sixty days of its decision issued on May 29, 1987, *United Steelworkers of America, AFL-CIO-CLC* v. *Pendergrass*, 819 F.2d 1263 (3d Cir. 1987), unless the Agency could demonstrate that such an expansion would not be feasible. The August final rule was OSHA's response to the Court's direction. However, the Agency recognized that had the standard been developed through a more complete rulemaking process, additional information regarding the feasibility or practicality of the provisions may have been included in the record. OSHA therefore established a sixty-day comment period on the final rule to permit interested parties to provide data or evidence regarding the feasibility or practicality of the provisions of the rule.

This NPRM proposes modifications to the final rule based upon information submitted to the rulemaking record, including a determination made by the Office of Management and Budget (OMB) under the Paperwork Reduction Act regarding the information collection requirements of the final rule. OSDA is inviting comment for sixty (60) days following publication of this NPRM, and is scheduling a public hearing to provide an opportunity for additional input.

* * * * *

I. History of OSHA's Hazard Communication Standard

The development of OSHA's Hazard Communication Standard (HCS) was initiated in 1974. The process has been lengthy and is discussed in detail in the preambles to both the original and revised final rules (*see* 48 FR 53280-81 and 52 FR 31852-54). This discussion will focus on the sequence of events which have occurred since the original final rule was filed at the Federal Register in 1983.

Petitions for judicial review of the rule were filed in the U.S. Court of Appeals for the Third Circuit (hereinafter referred to as the "the Court" or "the Third Circuit") on November 22, 1983, by the United Steelworkers of America, AFL-CIO-CLC, and by Public Citizen, Inc., representing itself and a number of labor groups. Motions to intervene in these cases were received from the Chemical Manufacturers Association, the American Petroleum Institute, the National Paint and Coatings Association, and the States of New York, Connecticut, and New Jersey. In addition, petitions for review of the standard were filed by the State of Massachusetts in the First Circuit; the State of New York in the Second Circuit; the State of Illinois in the Seventh Circuit; the Flavor and Extract Manufacturers' Association in the Fourth Circuit; and the Fragrance Materials Association in the District of Columbia Circuit. These cases were subsequently transferred to the Third Circuit and consolidated into one proceeding. The cases brought by the Flavor and Extract Manufacturers' Association and the Fragrance Materials Association were withdrawn prior to filing briefs.

The Court issued its initial decision on the challenges to the rule on May 24, 1985 (*United Steelworkers of America* v. *Auchter*, 763 F.2d 728 (3d Cir. 1985)). (*See* Ex. 4-21.) The standard was upheld in most respects, but three issues were remanded to the Agency for reconsideration. The decision was not appealed.

First, the Court concluded that the definition of trade secrets incorporated by OSHA included chemical identity information that was readily discoverable through reverse engineering and, therefore, was "broader than the protection afforded trade secrets by state law." The Court directed the Secretary of Labor to reconsider a trade secret definition which would not include chemical identity information that is readily discoverable through reverse en-

gineering. Secondly, the Court held the trade secret access rule in the standard invalid insofar as it limited access to health professionals, but found the access rule otherwise valid. The Secretary was directed to adopt a rule permitting access by employees and their collective bargaining representatives to trade secret chemical identities. OSHA complied with the Court orders regarding the two trade secret issues in a separate rule, published in final form on September 30, 1986 (51 FR 34590). The revised trade secret provisions were incorporated into the test of the final rule published on August 24, 1987.

The third issue remanded to OSHA involved the scope of industries covered by the standard. The original HCS applied to employers and employees in the manufacturing sector. The Court directed the Secretary of Labor to reconsider the standard's application to employees in other industry sectors, and "to order its application in those sectors unless he can state reasons why such application would not be feasible." 763 F.2d at 739, 743.

OSHA subsequently published an advance notice of proposed rulemaking (ANPR) to collect comments and information on the expansion of the scope to cover these additional sectors (50 FR 48795; November 27, 1985). In particular, the Agency sought information on the extent employers in non-manufacturing industries have already implemented various aspects of a hazard communication program. In addition, OSHA wanted to obtain data regarding the applicability of the provisions as written in the original rule to these other sectors. A total of 226 responses were received. (*See* Ex. 2). OSHA also commissioned a study of the economic impact of extending the HCS to the fifty major non-manufacturing industry groups within its jurisdiction. (*See* Exs. 4-1 and 4-2.) Based on this newly acquired evidence, as well as the

previous rulemaking record, OSHA was in the process of drafting a proposed rule.

On January 27, 1987, however, the United Steelworkers of America, AFL-CIO-CLC and Public Citizen, Inc., petitioners in the 1985 challenge, filed a Motion For An Order Enforcing the Court's Judgment and Holding Respondent in Civil Contempt. Petitioners claimed that the Court's 1985 order had not authorized OSHA to embark on further fact gathering and that OSHA should have made a feasibility determination based upon the 1985 rulemaking record. Petitioners also argued that even if further fact gathering had been allowed by the Court's order, OSHA's pace was unduly slow.

In response, OSHA noted that the Court's 1985 order did not specify that OSHA should act on the then-existing record. OSHA believed that seeking further evidence on feasibility in nonmanufacturing was appropriate in light of its statutory obligation to issue rules that are well grounded in a factual record. OSHA also asserted that, consistent with Supreme Court precedent, the Agency should be permitted to exercise its discretion in determining the appropriate rulemaking procedures for complying with the Court's remand order. Lastily, the Agency argued that its schedule to complete the rulemaking was reasonable and did not constitute undue delay.

On May 29, 1987, the Court issued a decision holding that the Court's 1985 remand order required consideration of the feasibility of an expanded standard without further rulemaking. *United Steelworkers of America, AFL-CIO-CLC* v. *Pendergrass*. 819 F.2d 1263 (3d Cir. 1987). (See Ex. 4-20.) The Court declared that adequate notice had been provided to non-manufacturers during the original rulemaking that they might be covered by the HCS, *id.* at 1265-1266, 1269, that the answers to the remaining questions OSHA may have had regarding feasibility were "self-

evident" or "readily ascertainable" from the briginal record, *id.* at 1268-69, and that further fact finding was "unnecessary". *id.* at 1268. The Court ordered the Agency to issue, within 60 days of its order, "a hazard communication standard applicable to all workers covered by the OSHA Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible." *Id.* at 1270.

OSHA subsequently re-evaluated the evidence in the record and determined that a modified final rule covering all employers subject to the Act (*i.e.*, both manufacturing and nonmanufacturing) was both necessary and feasible. The Agency therefore issued the final rule on Hazard Communication which was published in the **Federal Register** on August 24, 1987.

The only modifications OSHA made to the original rule in the August revision were those that were related to expansion of the scope. If the Agency had been able to publish a NPRM at that point, it had planned to propose other modifications based upon the ANPR comments as well as OSHA's considerable experience in implementing the original rule, and the experience of OSHA-approved State Plan States in implementing the HCS in the nonmanufacturing sector. Publication of a final rule precluded any actions other than those specifically required by the expansion, particularly since the Court determined that the record it reviewed (exhibits collected through November 1983) was a sufficient basis for the final rule. Thus evidence collected subsequent to that time was merely cited as additional substantiation for the expansion.

The revised final rule expanded the scope of industries covered from just the manufacturing sector to all industries where employees are exposed to hazardous chemicals. As OSHA stated at the time, the Agency has evidence to indicate that there is chemical exposure in every type of industry and thus employees in all industries must have protection under the rule. (*See* 52 FR 31858.)

As noted earlier, although the standard was issued as a final rule, OSHA invited interested parties to submit information, data or evidence regarding the feasibility or practicality of the provisions as written when applied to the non-manufacturing sector as well as any recommendations for further modification. A 60 day period was established for such comments, and it ended on October 23, 1987. A total of 136 comments were received (39 of them were received after the deadline), and entered into Docket H-022D. A variety of opinions were expressed in the comments regarding a number of issues, however, most of the comments did not contain data or evidence concerning either feasibility or practicality. Many of the comments were questions or requests for classification of the provisions.

OSHA is proposing some modifications it believes are appropriate to address concerns raised and clarify the requirements. The Agency is also providing clarification regarding other issues in this preamble discussion. The Agency is, of course, always prepared to respond to any specific questions from the regulated community regarding compliance. To this end, OSHA has appointed a Hazard Communication Coordinator in each Regional Office to whom such questions should be directed. Instructions to OSHA's compliance staff regarding enforcement of the HCS also include interpretations and many employers have found these documents to be useful to them in complying with the rule. These instructions are included in the docket as Ex. 4-24, and copies may be obtained from OSHA's Publication Officer, (202) 523-9667. A booklet summarizing the rule's provisions is also

available and may be used by employers in training workers regarding the requirements of the rule (the publication number is OSHA 3084 Revised).

In addition to the comments submitted to OSHA, the Office of Management and Budget (OMB) convened a public meeting under the Paperwork Reduction Act (44 U.S.C. Chapter 35) to address the information collection requirements of the expanded rule. The transcript of the OMB public meeting (which was held on October 16, 1987) is entered in the docket as comment 5-76, and other relevant documents (*e.g.*, copies of statements, etc.) are entered in Exhibit 6. (In addition, the transcript of an April 2, 1987, public meeting on the information collection requirements for the manufacturing sector is Ex. 4-3). The majority of the participants in OMB's October 16 meeting submitted written comments to OSHA as well, so there is considerable duplication in Exhibit 6 of opinions that had already been expressed by the same parties in other parts of the rulemaking record.

In a letter sent to the Department of Labor on October 28, 1987, and subsequently published by OSHA in the **Federal Register** on December 4, 1987 (52 FR 46075) (Ex. 4-67), OMB, under the authority of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), disapproved certain information collection requirements in the expanded scope rule, as of the rule's effective date (May 23, 1988), based upon the record of the October 16 public meeting and the previous meeting on April 2, 1987 regarding the information collection requirements for the manufacturing sector, as well as OSHA's preamble to its August 24 rule and its justification submitted formally under the Paperwork Reduction Act. The October 28 letter stated that OMB disapproved: (1) The requirement that material safety data sheets be provided on multi-employer worksites; (2) coverage of any consumer product that falls within the

"consumer products" exemption included in section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986; and (3) coverage of any drugs regulated by the Food and Drug Administration in the non-manufacturing sector. In addition, OMB determined that OSHA should reopen the rulemaking on the HCS to consider alternatives to the definition of "article" which was included in both the original and revised final rules. Lastly, OMB conditioned paperwork approval upon OSHA's consulting with the U.S. Small Business Administration and the Department of Commerce in order to develop a plan for a Federal administrative effort that will provide assistance to the regulated industries to alleviate paperwork burdens and costs. For a complete description of OMB's rationale for these determinations, *see* the **Federal Register** notice of December 4, 1987 (52 FR 46075). This document will only summarize the positions taken by OMB.

On April 23, 1988, OMB extended its approval of all information collection requirements in the HCS through April 1991, except that OMB continued to disapprove the three provisions previously disapproved, 53 FR 15033. OMB's approval of the existing definition of "article" was limited to the clarification included in a January 14, 1988, letter from Assistant Secretary for Occupational Safety and Health John Pendergrass to OMB, which stated that "absent evidence that releases of such very small quantities could present a health hazard to employees, the article exception to the rule's requirements would apply." In response to commenters who requested that OMB not extend approval to any requirements in the non-manufacturing sector, OMB also stated:

> The concerns of these commenters are largely based on the possibility that the standard and OMB's deci-

sion under the PRA will change dramatically as a result of the rulemaking. Although change is always possible, any such change would be fully considered during the rulemaking process. Of course, in order for OMB to grant PRA approvals, any changes must offer sufficient practical utility to justify any incremental paperwork burden they impose, including the burden of revising already-developed written programs. Moreover, as stated above, we are continuing to disapprove the previously-disapproved provisions; the rulemaking should of course conform the rule to these disapprovals.

In accordance with the Paperwork Reduction Act and the implementing regulations for that Act (5 CFR 1320.13(g) and 1320.14(f) and (g)), OSHA is reopening the rulé on all of the issues raised by OMB in its letter in order to have an opportunity to fully discuss the complete current record on each item, as well as to collect additional data from the public. The issues and alternatives for dealing with them are described further below. OSHA is also proposing certain minor modifications, described below, and invites comment on them as well.

Regarding OMB's requirement that OSHA develop a plan to assist the regulated community with the paperwork associated with the HCS, the Agency is in the process of developing compliance assistance materials. These include OSHA 3084, a booklet explaining the provisions of the rule, and a compliance kit designed to help employers come into compliance. The compliance kit will be made available through the Government Printing Office within a few months. A press release will provide information about obtaining a copy at such time as it becomes available. For further information, please contact OSHA's Office of Information and Consumer Affairs, (202) 523-8151.

The revised final rule has been challenged in the U.S. Court of Appeals by the Associated Builders and Contractors, National Grain and Feed Association, Associated General Contractors of Virginia, Associated General Contractors of America, and United Technologies Corporation. A number of interested parties have intervened in these cases as well. The challenges are in the preliminary stages of adjudication at this point, and generally involve the appropriateness of OSHA's publishing a final rule in response to the Third Circuit's order.

Although these cases were originally consolidated in the U.S. Court of Appeals for the District of Columbia Circuit, they were transferred to the U.S. Court of Appeals for the Third Circuit on May 20, 1988. The cases were transferred to the Third Circuit because the "revised [HCS] was promulgated in response to orders by the Third Circuit • • • and petitioners have raised issues similar to those already considered by that court."

On June 24, 1988, the Third Circuit granted a stay of the standard as it applies to the construction industry (29 CFR 1926.59) pending the outcome of the litigation challenging the rule. The rule is in effect for all other employers in both the manufacturing and nonmanufacturing sectors. OSHA published a notice in the **Federal Register** on July 22, 1988 (53 FR 27679) to provide affected employers further information regarding the applicability of the stay and enforcement of the rule.

In addition to these challenges of the revised HCS, the United Steelworkers of America, AFL-CIO-CLC, and Public Citizen have filed a motion with the Third Circuit requesting the court to order that OSHA enforce all of the revised HCS including the three requirements OMB disapproved under authority of the Paperwork Reduction Act. OSHA will continue to abide by the OMB decision and

will not enforce the disapproved requirements unless otherwise ordered by the Court.

Advisory Committee on Construction Safety and Health (ACCSH). As discussed in the preamble to the August 1987 final rule (52 FR 31858-59), the ACCSH reviewed a draft notice of proposed rulemaking to expand the scope of the HCS to construction on June 23, 1987. The ACCSH went through the NPRM line-by-line, making recommendations to adapt it to construction industry, *i.e.*, the document with the recommended changes constituted an ACCSH recommended standard for hazard communication. A number of the recommendations were adopted (*e.g.*, the definition of workplace was modified to include job sites or projects; the written hazard communication program requirements were amended to clearly state that the programs are to be maintained at the site).

As this NPRM addresses issues that affect construction, OSHA transmitted a draft of it to the ACCSH for review and comment. In a meeting on March 30, 1988, the ACCSH did not provide specific recommendations on the NPRM. The ACCSH reiterated its desire to have a separate standard for construction, and appointed a subcommittee to make further recommendations to the Assistant Secretary. However, the ACCSH also reaffirmed that the standard as written should be implemented as scheduled on May 23, 1988.

The three primary issues in this NPRM that affect construction—the definition of "article," the coverage of consumer products, and the maintenance of material safety data sheets on multi-employer worksites—were all previously considered by the ACCSH on June 23, 1987.

With regard to the definition of "article," the ACCSH recommended that the definition state that vapors, mists, gases, and fumes are not to be considered articles (Tr. 97-8). As OSHA explained during the meeting, those types

of materials do not meet the definition in any event, and would not be considered articles. Thus there is no need for that particular modification. There were no further comments on the definition or its application to the construction industry during that meeting.

The ACCSH also reviewed OSHA's proposed exemption for consumer products, *i.e.*, that consumer products be exempt where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers. A motion was initially made to modify the exemption to allow consumer products used "as approved for consumer use, and which will not result in any duration or frequency of exposure which is greater than applicable threshold limit values for any hour of use." Tr. 81. After further discussion regarding the lack of a mechanism for "approval" for consumer use that would apply in this situation, and the lack of threshold limit values for the majority of chemicals in the workplace, the ACCSH voted to approve an amended exemption which reads "where the employer can demonstrate it is used in the workplace in the same manner as recommended for consumer use, and which will not result in any duration and frequency of exposure, which is greater than exposures experienced by consumers." Tr. 90.

The ACCSH also reviewed the requirement for maintenance of material safety data sheets on multi-employer worksites, and did not object to such a provision or indicate that it would be infeasible or unnecessary to have such a requirement. In fact, the committee further recommended that it be made explicit that written programs be maintained at the worksite, a recommendation that OSHA adopted.

II. Summary and Explanation of the Issues and the Provisions of the Notice of Proposed Rulemaking

The regulatory text presented in this document only addresses the proposed modifications, rather than reprinting the entire standard and incorporating the proposed changes. Since the HCS is lengthy and complicated, OSHA believes that this will make it easier for interested parties to identify the proposed modifications and provide appropriate comment. When the final rule is promulgated, OSHA will reprint the entire text including the modified provisions.

The discussion which follows is also limited primarily to the proposed changes and related issues. It does not provide a complete summary and explanation of all of the provisions of the rule—for such information interested parties should refer to the preambles of the original (48 FR 53334-40) and revised (52 FR 31860-67) final rules. There are also discussions of alternatives to the proposed modifications which have been suggested to OSHA. OSHA is inviting comment on these as well as the regulatory text itself. While the purpose of this rulemaking is principally to resolve the issues presented by the proposed and alternative provisions, OSHA is also interested in receiving comment on other issues that may be related to the proposal. In order to assist OSHA in its development of the final HCS in the nonmanufacturing sector, comment will also be accepted and considered concerning the entire rule's application to the nonmanufacturing sector.

As most interested parties are aware, the rulemaking record on this standard is quite extensive, and all of the material submitted to date will be considered in development of the new final rule. It is therefore not necessary, or desirable, to repeat comments previously provided unless

there is new data, evidence or other information available concerning the arguments made.

In reopening the record, OSHA recognizes that it is not operating "on a clean slate." In developing the existing standard, OSHA had the benefit of an extensive evidentiary record. In addition, the Agency's experience gained under the original standard, as well as under State standards, some of which already applied to the nonmanufacturing sector, further supported OSHA's current standard. As explained in detail below, OSHA continues to believe that the record substantially justified the Agency's regulatory choices, and the information presented to OSHA after the standard was issued has, by and large, not convinced OSHA that significant changes are warranted to comply with the OSH Act.

In this rulemaking, OSHA is seeking additional information on whether these regulatory choices also meet the criteria of the Paperwork Reduction Act. If information collected in the course of this rulemaking responds to the concerns raised by OMB on these issues in its October 28, 1987, letter, OSHA will request that OMB reconsider its paperwork decision on these issues. OSHA will also consider requesting paperwork approval for other options substantially supported by the record, as well as conforming the final rule to OMB's paperwork decisions.

OMB has published implementing regulations at 5 CFR 1320.4(b) which state that, to obtain OMB approval of a collection of information, an agency shall demonstrate that it has taken every reasonable step to ensure that:

(1) The collection of information is the least burdensome for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives;

(2) The collection of information is not duplicative of information otherwise accessible to the agency; and,

(3) The collection of information has practical utility. Commenters to the record should focus on these criteria in this rulemaking.

OSHA will fully comply with the Paperwork Reduction Act, which prohibits agencies from "conducting or sponsoring" a collection of information without OMB approval. Hence, the provisions disapproved by OMB will be neither effective nor enforceable until OSHA completes this rulemaking.

It should be noted, however, that OSHA retains "almost unlimited discretion to devise means to achieve the Congressionally mandated goal." *United Steelworkers of America* v. *Marshall,* 647 F.2d 1189, 1230 (D.C. Cir. 1980), *cert. denied,* 453 U.S. 913 (1981). *Accord, Building and Construction Trades Dept., ALF-CIO* v. *Brock,* 838 F.2d 1258, 1271 (D.C. Cir. 1988). The expectations of the manufacturing sector, which has been subject to the HCS since 1985, are settled, as are those of the nonmanufacturing sector, which has been preparing to comply with the present standard since August 1987, and with the paperwork requirements as approved by OMB since October 1987. Therefore, OSHA does not expect the standard to further change significantly unless the Agency is presented with substantial evidence that a regulatory modification is clearly necessary, either because the present standard is demonstrably infeasible in a specific respect, or because the proposed alternative would significantly increase the standard's intended safety and health benefit or significantly improve its cost-effectiveness. Employers must plan accordingly to fulfill their compliance obligations under the standard as it is currently approved and should not anticipate undue delay in its enforcement.

Comments submitted should clearly identify the provisions being addressed, the rationale for the position taken, and data or evidence in support of that rationale.

The discussion which follows is organized by paragraph of the standard for ease of reference. It is suggested that comments submitted be presented in the same fashion.

* * * * *

Food, drugs, cosmetics, and alcoholic beverages. In the revised final rule, OSHA included an exemption for food, drugs, cosmetics, or alcoholic beverages in a retail establishment which are packaged for sale to consumers (paragraph (b)(6)(v)). This exemption recognized that even where these chemicals are hazardous chemicals (and many are not, particularly in the area of food items), they present little or no hazard to employees when they are in final packaged form for sale to consumers. This exemption effectively limited coverage of many retail establishments which only have hazardous chemicals in this form, *i.e.,* packaged for sale to consumers. But it did not exempt these products when they are being used in a retail establishment and thus exposing employees—such as beauty products being used in a salon.

OSHA has received comments and questions about the application of this exemption from both businesses distributing to retail food establishments (*see,* Ex. 5-97) and the retail establishments themselves (*see,* Ex. 5-5). As stated in the preamble to the revised final rule, if a product is exempted downstream, a distributor has no responsibility for providing a MSDS on that product to the retail distributor. "In addition, since these products are exempted, employers which package them for retail sale would not have to furnish material safety data sheets to distributors receiving the products." 52 FR 31862.

OSHA is proposing a further modification to this exemption which both clarifies and extends it to other food and alcoholic beverage products in retail establishments which are being prepared for consumption by consumers.

Thus food which is used for cooking meals to be sold to customers would be exempt, as would alcoholic beverages which are sold by the glass and thus prepared for consumption rather than "packaged" for consumer use. Although OSHA believes that most such products in terms of food items would not be hazardous under the rule in any event, it appears that some manufacturers are nevertheless providing material safety data sheets for such items as aflatoxin in peanut butter used in a restaurant. To ensure such interpretations are not made, and that material safety data sheets are not unnecessarily being provided for such items, OSHA is proposing this modification to the exemption and inviting comment on the proposed language.

Consumer products. One of the principles upon which the HCS is built is that employees are entitled to information regarding any chemical which is hazardous and to which they are potentially exposed. The type of use this product is intended for is irrelevant—the risk being addressed is exposure to a chemical without knowing what the hazards and appropriate protective measures are. That being the case, the 1982 NPRM contained no exemptions for any "types" of chemicals. The exemptions which were in the original final rule were based upon comments submitted to the rulemaking record after that proposal. OSHA limited the exemptions to situations where other regulatory programs adequately addressed the problems involved (*e.g.*, labeling exemptions for those products labeled in accordance with another Federal agency's requirements), or where the hazards did not result from workplace exposure.

In the area of consumer products, the original final rule included an exemption for additional labels on such products when they are labeled in accordance with the requirements of the Consumer Product Safety Commission

(CPSC). CPSC's requirements for labeling of hazardous substances are for the purpose of protecting consumers when such products are used in the home, the school, and recreational facilities (15 U.S.C. 2052(a)(1)). The Federal Hazardous Substances Act, 15 U.S.C. 1261 *et seq.*, and regulations issued under that Act by CPSC are not designed to protect workers. *See American Petroleum Institute v. OSHA*, 581 F.2d 493, 510 (5th Cir. 1978), *aff'd on other grounds sub. nom. Industrial Union Dep't. v. American Petroleum Institute*, 448 U.S. 607 (1980).

Consumer products generally do not include the type of specific hazard information OSHA would require on the labels of containers of hazardous chemicals which are shipped. Although some consideration is given to chronic hazards, the basic emphasis is on acute effects. In addition, the labels focus on precautionary statements and routes of exposure rather than informing the user of the specific hazards. For example, a label for lead solder purchased in a hardware store indicates that it is "fatal if swallowed" and "causes severe burns," but gives no indication of the fact that lead causes not only acute lead poisoning but also has severe effects on a number of body systems, including damage to blood-forming, nervous, and reproductive systems (*see*, OSHA's lead standard, 29 CFR 1910.1025). Furthermore, the primary route of entry for occupational exposure to lead would normally be inhalation—the consumer label does not indicate that inhalation of fumes generated when soldering are of concern. (Ex. 4-71). Conversely, a properly prepared MSDS for the same material will indicate the full range of health effects, the appropriate protective measures, the fact that there is an OSHA standard for the material with a permissible exposure limit, and other useful information for both the employer and the employee being exposed.

OSHA nevertheless decided to permit the CPSC labels to suffice so as not to disrupt the extensive labeling conducted in accordance with those rules. OSHA believed that this could be justified on the basis that some information is provided on the labels that would be useful to workers, and that the requirement for MSDSs would provide what information is necessary to supplement the labels. 48 FR 53289. This additional information is critical to ensuring that training can be properly conducted, and that adequate protective measures are used in the workplace.

OSHA is not preempted from modifying the labeling requirements for those products covered by CPSC that may also be found in the workplace. 15 U.S.C. 2080. Where products are used in both industry and the home "there may be dual, or overlapping jurisdiction between the Secretary of Labor under OSHA and the Commission under the Consumer Product Safety Act." W. Kimble, *Federal Consumer Product Safety Act*, 337 (1975). "Different standards may * * * be applied to eliminate or reduce a hazard to the consumer than are applied to eliminate or reduce the same hazard as it confronts the * * * workman * * * *Id.* As the Fifth Circuit of the U.S. Court of Appeals found when considering labeling requirements for benzene, "[A]lthough an existing requirement for labeling under another act may affect the reasonable necessity for an OSHA requirement" section 4(b)(1) of the OSHA Act does not prohibit OSHA from requiring containers of hazardous chemicals to bear the warning labels authorized by section 6(b)(7) when the CPSC requires labels on the same products. *API v. OSHA*, 581 F.2d at 510. Therefore, OSHA is free to impose requirements determined to be necessary to protect employees from the hazards of products that may also be considered

consumer products regulated under the requirements of the CPSC.

Upon considering what information is necessary for the protection of workers exposed to those so-called consumer products in the workplace, OSHA decided that protection of workers would be served by allowing the CPSC labels to suffice, but requiring MSDSs and training as for any other hazardous chemicals. There appears to be some misconception that by virtue of being permitted to be marketed to consumers, consumer products are inherently safe and don't require any additional information be given to workers using them. This certainly is not the case.

The Consumer Product Safety Commission (CPSC), in its National Electronic Injury Surveillance System (NEISS), compiles estimates of product-associated injuries based on a statistically significant sample of incidents reported to institutions with emergency treatment department. Information regarding work-related injuries treated in emergency rooms has subsequently been provided by CPSC to the National Institute for Occupational Safety and Health (NIOSH). *See* Ex. 4-77.

These work-related data are total numbers of chemical injuries, and are not collected in such a way that the consumer product injuries in the workplace can be separated from other chemical product injuries. The CPSC version of the data is reported by type of product, while the NIOSH work-related data is grouped by source of injury. Nevertheless, much information regarding reported injuries can be derived from the data as presented, and give some indication of the numbers of serious injuries related to the use of chemicals. Since these data only deal with injuries which require emergency room treatment, it can be assumed that they are a small subset of the total number of injuries which occur.

According to the CPSC, the national estimate for emergency room treatments of injuries related to paints, varnishes, and shellacs is 10,712 and 75% of these injuries occur in adults from ages 15 through 64, an age range which would encompass adults who work. At least 5% of these injuries result in hospitalization. National estimates for other types of chemical products which would also be found in the workplace include: 7530 injuries related to adhesives (51% of them in the adult working age categories); 3186 injuries related to lubricants (71% in the adult working age categories); 2977 related to drain cleaners (63% working age adults); 1882 related to automotive chemicals (69% working age adults); and 5584 related to laundry soaps or detergents (52% working age adults). There are many other products for which injuries are reported and which would be expected to be found in the workplace. These numbers indicate that adults of working age are being injured through the use of consumer products, whether in the home or in the workplace. In workplaces where these products are being used more frequently or for longer periods of time, the risk of injury increases. Appropriate communication of hazards and protective measures decreases that risk of injury.

The NIOSH data indicate that a total of 136,212 work-related chemical injuries were estimated to have been treated in emergency rooms in 1986. The sources of injuries included in this total were chemicals and chemical compounds (solids, liquids, gases): 102,428; coal and petroleum products; 23,532; and soaps, detergents, cleaning compounds not classified elsewhere: 10,252. There were other categories of sources of injuries that had chemical product exposures in them, but these three were expected to be the ones of cost significance. As mentioned above, it is not possible to determine which of these work-related injuries result solely from consumer products.

However, in categories such as soaps, detergents, and cleaning compounds, it can reasonably be assumed that a number of them were consumer products.

Many products used industrially are also sold and used as consumer products. Thus, exempting such products is in essence exempting them because of the method of distribution for them, *i.e.*, that they are generally sold in retail establishments, rather than through wholesale distribution systems. This is not an appropriate rationale for such an exemption since it does not consider either exposure or hazardous nature. Of particular concern is that the CPSC label is designed to protect consumers under normal conditions of consumer use, or reasonably foreseen misuse, and is frequently directed towards protection of children unintentionally exposed in the home, rather than being directed towards protection of workers exposed repeatedly, and to potentially larger concentrations of the material. In fact, a number of consumer product labels recognize this difference in exposure and note on the label either that the product is not intended to be used in the workplace (Ex. 4-64), or that a material safety data sheet should be acquired if it is used in the workplace (Ex. 4-71).

It is also important to note that the record overwhelmingly supports the need for a comprehensive hazard communication program, comprised of labels, material safety data sheets, and training. In 1981, OSHA published and later withdrew a NPRM which was a labeling standard – it had no provisions for development of material safety data sheets or for training. One of the primary reasons for the withdrawal was the lack of support for a rule which relied only on label information. In fact, only one commenter on the 1982 NPRM believed that the MSDS should not be the primary source of information on the chemical (H-022 Ex. 19-49), whereas numerous respondents endorsed the MSDS provisions and role in hazard communication as

being important and necessary (*see, e.g.*, H-022 Exs. 19-11, 19-62, 19-75, 19-91, 19-119, 19-156, 19-177, and 19-207). For example, the Chemical Manufacturers Assocation (Ex. 19-91) stated that: "[T]he proposed standard appropriately makes the MSDS, rather than the actual container in the workplace, the source from which employees and their representatives may obtain detailed information regarding potentially hazardous substances used in the workplace." Similarly, the American Petroleum Institute (Ex. 19-111) stated that "labels may not always be the most effective means for communicating the potential hazards of a work area * * *" and that "MSDSs constitute a vital means of communicating safety and health hazards presented by particular chemicals and mixtures to *employer/users* * * *." And American Cyanamid Company also agreed that "the use of the MSDS as the primary source of data for properties of commercial chemicals is a worthy part of the proposed regulation * * *." (Ex. 19-119.)

OSHA thus did not exempt consumer products from any provisions of the original final rule other than labeling. This was an explicit recognition by the Agency of the greater potential for exposure in the workplace, and the lack of complete information on consumer product labels to address such situations (48 FR 53289):

> OSHA recognizes, however, that there may be situations where worker exposure is significantly greater than that of consumers, and that under these circumstances substances which are safe for contemplated consumer use may pose unique hazards in the workplace. For this reason, the standard's exclusion is limited to labeling. It does not exempt employers from the material safety data sheet and training requirements of the standard with respect to any of these substances, provided of course that the substance otherwise meets the standard's definition of hazardous chemical. Moreover, it should be stressed

> that these labeling exclusions are for the enumerated substances only. To the extent that any employer uses other chemicals, such as in the manufacture or processing of these substances, they are fully subject to the requirements of this standard.

During the implementation of the original final rule, OSHA determined that its enforcement policy regarding consumer products would focus on the type and extent of usage (*see*, OSHA's instructions to compliance officers for enforcement of the HCS, Ex. 4-24):

> A common sense approach must be employed whenever a product is used in a manner similar to which it could be used by a consumer, thus resulting in levels of exposure comparable to consumer exposure. The frequency and duration of use should be considered. For example, it may not be necessary to have a data sheet for a can of cleanser used to clean the sink in an employee restroom. However, if such cleanser is used in large quantities to clean process equipment, it should be addressed in the Hazard Communication Program.

This appeared to OSHA to be a reasonable accommodation for employers who really do use consumer products in the manner intended, and with the same frequency and duration of exposure as would be experienced as consumers. OSHA has had no problems in implementing this enforcement policy, and it has been our experience that covered employers understand it and are able to comply. Therefore, although it is a policy which decreases the amount of information available to some employees covered under the rule, OSHA felt it could be justified based on the fact that under the same circumstances in the home the same type of information would be available to that individual for protection. Many employers have told OSHA that consumer products are included in their hazard communication programs regardless of the en-

forcement policy of the Agency because they believe that all hazardous chemicals should be included in an appropriate hazardous materials management program.

OSHA recognized that many more non-manufacturers would use consumer products than would be found in manufacturing facilities, and that the method of obtaining them might more likely be from retail distributors than wholesale. Thus the ANPR included questions regarding the use of such products, and the means of obtaining them. Relatively few responses were received. However, the responses did confirm that in many cases the use of consumer products results in significant exposures that warrant more information being available than that which appears on a consumer product label. For example, Daniel Construction Company responded to the questions as follows (Ex. 2-59):

> The most common "consumer products" used in the construction industry are wood and wood products, caulking, and aerosol cans of spray paints, cleaners, lubricants, and solvents. These products are not typically used differently than consumers do. That does not mean that employees cannot be overexposed to the ingredients. For example, a 16-ounce spray can of paint used in a 10′ × 10′ × 10′ room can produce a concentration of solvent that is more than ten times the acceptable exposure limit.

Of course a consumer product label would not normally indicate that there is a permissible exposure limit for a solvent present in the paint since this information is unrelated to consumer use and exposure. However, a MSDS for the product would be required to include such information which will enable the employer to ensure that employees are properly protected in a situation as that described by Daniel Construction Company. In fact, the CPSC has recommended the use of MSDSs for products they cover in school laboratories (Ex. 4-56), recognizing

that additional information is desirable in these types of exposure situations. "Material safety data sheets should be obtained on each chemical delineating particular hazards or handling procedures." "Have a material safety data sheet on hand before using a chemical."

Similarly, the American Gas Association (Ex. 2-83) indicated that use of consumer products could result in different exposure levels than those encountered during consumer use:

> It could occur—not because of different use, but because the use by employees is for prolonged periods of time. An average consumer may use a cleanser several times a week to clean the kitchen or bathroom floor, whereas a gas company employee may use the same cleanser every day to clean a gas facility.

The Massachusetts Institute of Technology (MIT) (Ex. 2-120) also indicated that their employees are exposed to consumer products in greater amounts than consumers would be, including paint and thinners used by the painters, printing fluids used by the graphic arts services, cleaning and polishing chemicals used by the custodians, lawn and garden chemicals used by the grounds maintenance crew, and lubricating sprays and other maintenance products used by mechanics/electricians. MIT obtains MSDSs from vendors to ensure employees are properly protected from these materials. Mountain Bell (Ex. 2-164) also confirms that consumer product exposures may be greater in its industry, particularly " * * * where products are used on an extensive basis such as in automotive operations, janitorial operations, and copying operations * * *."

A few respondents felt that the consumer product label should be enough information (Exs. 2-75, 2-79, 2-99, 2-107, and 2-116). Others, however, noted that employees are not getting enough information regarding these prod-

ucts and that MSDSs should be made available. For example, Economics Laboratory, Inc., a manufacturer of consumer products for cleaning and sanitizing, suggested (Ex. 2-67):

> In the use of cleaning and sanitizing products, a principal point of worker exposure is during the transfer of concentrate from the original container to prepare a use solution. We supply products labeled as per ANSI and/or FHSA, but we have seen instances of deficient labeling on the products of some other manufacturers. We now send to all customers in these sectors an MSDS for every product they purchase. Many of our customers now use the labels, MSDS and other aids to train employees, but a formal requirement would increase that number throughout the industry.

The Adhesive and Sealant Council, a trade association which represents manufacturers of materials that may be marked as consumer products, also addressed this issue (Ex. 2-109):

> * * * The Council is concerned that in certain cases hazard information may not reach employees of manufacturers and nonmanufacturers. ASC members are aware of cases in which consumer products are purchased from retailers or distributors in consumer quantities but are used in the workplace. Under such circumstances the original manufacturer is not made aware of the use of its consumer products in the workplace. Thus, some workers may lack needed hazard information unless they or their employer affirmatively and voluntarily make an effort to obtain and promulgate the information.
>
> There are, of course, safety requirements applicable to consumer products under the Consumer Product Safety Act, and other federal laws, but these do not contain broad workplace safety requirements beyond standards and labeling, such as material safety data sheets. The present OSHA docket has not been opened as to this issue. However, ASC believes the problem could be greater with regard to non-manufacturer distribution than with direct manufacturer distribution * * *

One further comment submitted by an employee representative summed up the situation by stating that when a product is used by a professional in the workplace, it is no longer a "consumer" product regardless of the fact that a consumer can purchase the same product (Ex. 2-199).

OSHA decided to incorporate into the revised final rule its existing enforcement policy which is tied to type and extent of exposure (52 FR 31878; paragraph (b)(6)(vii)):

> Any consumer product or hazardous substance, as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 *et seq.*) respectively, where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers * * *.

OSHA further stated that this exemption "strikes a balance between the practical considerations of acquiring and maintaining material safety data sheets on CPSC regulated products which employees are exposed to at home as well as at work, and the worker's need for more hazard information than a CSPC label when exposures are greater or more frequent than typical public use of the chemical would generate." 52 FR 31863. OSHA had also examined the existing State rules in the area of right-to-know, and found that many had consumer product exemptions that were related to the type and extent of usage. (*See, e.g.*, Illinois, 48 Ill. Rev. Stat. s1401 (consumer goods exempted "provided that employee exposure to such consumer goods is not significantly greater than consumer

exposure occurring during the principal consumer uses of the consumer goods"); Maine, 26 M.R.S.A. s1709-1725 as amended (exempts consumer products and foodstuffs "to which, in the employer's knowledge, employee exposure is not significantly different from that of the general public during foreseeable use of the substance"); Massachusetts, Chapter 111F of Massachusetts General Laws (exempts consumer goods which are not carcinogens, mutagens, teratogens, neurotoxins, or "extraordinarily hazardous" substances and which are "used in the workplace in such a manner that employee exposure is equivalent to exposures resulting from consumer usage"). Other State rules are consistent with the original HCS and have no exemptions for consumer products (*see, e.g.*, Arizona, Kentucky, South Carolina).

There were some comments submitted on the coverage of consumer products following the publication of the revised final rule. A number of them felt that they could not define what exposures in the workplace would be comparable to consumer exposure, and that the rule should exempt such exposures unless they are "significantly" greater than consumer exposure or that such products should be completely exempted (Exs. 5-53, 5-72, 5-88, 5-93, 5-94, and 5-97). As we have stated earlier, a common sense approach is required in making these determinations, and most employers we have dealt with clearly know whether the use of such products is unusual or frequent. However, we are inviting further comment on the issue of adding the word "significantly" to the consumer product exemption to modify "greater."

Another suggestion submitted (Exs. 5-84, 5-93) was to use the same consumer product exemption used by Congress in the community right-to-know provisions of the Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. 99-499 (Ex. 4-16), which is being implemented by the Environmental Protection Agency (EPA). The exemption would then be for "any substance to the

extent that it is used for personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public." As this exemption is also not related to the extent of employee exposure—which is the concern of OSHA in the HCS—it is not appropriate for this rule.

The legislative history for SARA does not discuss the household or consumer product exemption. OSHA's rule preceded the SARA legislation, and it can be argued that the exemptions in SARA were intended by Congress to address the different needs of community right-to-know versus worker right-to-know. Community right-to-know under SARA entails informing the general public and emergency response facilities about chemicals in their neighborhoods that could cause hazardous conditions during emergency situations. The HCS involves informing employees about the chemicals they are potentially exposed to on a day-to-day basis as a result of their work. Exemption of consumer products under SARA was not a determination by Congress that such coverage is unnecessary in the workplace.

The National Paint and Coatings Assocation (NPCA) suggested that it is too costly to provide MSDSs to paint contractors and retail establishments and that they therefore should not be required for consumer product paints (Ex. 2-75). Alternatively, NPCA suggested containers of one gallon or less should be exempted. As has already been described, OSHA believes that the only appropriate criteria for determining whether a chemical is covered is the existence of a hazard and the potential for exposure. Both of these criteria are met for many paint products. As was described above, use of even a 16 ounce spray can of paint can result in employee exposures of ten times the permissible exposure limit, so the size of the container is not the determining factor.

The NPCA indicated that it would be difficult to comply due to the large numbers of products involved and the multiplicity of distributors. However, there are already a number of States which require MSDSs for such products, and it is our understanding that many employers in construction have been able to obtain MSDSs for consumer product paints from their vendors. Furthermore, there is evidence in the record that paint producers customarily distribute documents referred to as "technical data sheets" which prescribe methods of application and other use-related information, including, in some situations, brief indications of hazards (Ex. 4-60). These technical data sheets are apparently supplied to distributors to provide information regarding the products that does not appear on the product labels. It appears to OSHA that if these sheets can efficiently be distributed for paint products, then MSDSs can as well. Alternatively, the information required on a MSDS could merely be added to the technical data sheets. It certainly cannot be argued that labels alone provide the same type of information that a MSDS would.

An issue that is related to the coverage of consumer products, and is undoubtedly the genesis of some of the recommendations to eliminate such products from coverage, is the distribution of consumer products in commerce. It is important to point out that the vast majority of consumer products are not covered by this rule. Only those which are hazardous are potentially covered, and within that group, only those which are used in the workplace. Producers of the materials which, while marketed to consumers, are likely to be sold to employers and used in the workplace are well aware of that potential market. (*See, e.g.*, Ex. 2-148.) Thus manufacturers of materials used in construction, graphic arts, and clearning operations, are aware that their products have industrial applications even when sold as consumer products. MSDSs

have already been prepared and distributed for many, if not most, of these products. Manufacturers are required to have MSDSs for their own workers, and have already been required to distribute such MSDSs to non-manufacturing customers in a significant number of states with right-to-know rules. Furthermore, most manufacturers have and make available MSDSs because of product liability concerns separate and apart from any regulatory requirements. This was certainly demonstrated in the record by the large number of manufacturers that produced MSDSs in the absence of such requirements prior to promulgation of the original HCS. The sealed container provision also eliminates many consumer products from coverage in workplaces which may handle such materials, but do not open the containers to use them.

The record for the original final rule strongly supported the need for automatic transmittal of MSDSs from producers to users through the supply chain. The cost analyses of the rule demonstrated that a system that relies on users requesting a copy of a MSDS will be more costly, and less protective (48 FR 53327). However, in the revised final rule, OSHA determined that where retail distributors are involved in the distribution chain it was necessary to slightly revise this position. Therefore, the revised final rule stated (52 FR 31882, paragraph (g)(7)):

Retail distributors which sell hazardous chemicals to commercial customers shall provide a material safety data sheet upon request, and shall post a sign or otherwise inform them that a material safety data sheet is available. Chemical manufacturers, importers, and distributors need not provide material safety data sheets to retail distributors which have informed them that the retail distributor does not sell the product to commercial customers or open the sealed container to use it in their own workplaces.

OSHA provided the following rationale for this departure from the automatic provision approach found to be necessary in the original final rule (52 FR 31866):

> Retail distributors, however, often sell to businesses and the general public and frequently have no way of knowing who a particular purchaser is. Under the current rule, retail distributors might have to give material safety data sheets to each customer to ensure that commercial customers get the information they need under the HCS. A specific statement regarding retail distributors is, therefore, included in paragraph (g)(7) to address this practical problem. Those retail distributors who sell hazardous chemicals to employers must provide a material safety data sheet upon request, and must post a sign or otherwise inform the employers that an MSDS is available.

OSHA recognizes that although it is possible for an employer to incidentally purchase a hazardous chemical from any type of retail establishment, it is not reasonable to expect every retail store that happens to carry such materials to keep a file of MSDSs in case an employer decides to make a random purchase at the store. We further recognize that such random purchases would normally be of small amounts that would generally be used as a consumer uses them, and thus would be exempt under the rule anyway. However, even in those cases where they are used in greater quantities, it appears more reasonable to place the burden on the user in that situation to obtain the MSDS than to have every retail establishment keep large numbers of them on file. This provision also limits the number of establishments to which distributors of such products have to transmit MSDSs.

The National Retail Merchants Association (NRMA) (Ex. 5-74) indicated that the final rule " * * * has struck a good balance between the obvious problem of requiring retailers to train all employees about every product which

may appear on retailers' shelves, and the real need for employee training for emergency spillage of packaged products." They did think, however, that the definition of "consumer product" as stated by CPSC might be confusing to retailers, particularly small businesses, since "retailers would have to go through the process of examining all goods sold in their stores to determine if they are or are not consumer products." In fact, if retailers are selling the products they are considered to be "consumer" products—there is no determination to be made by the retailer in this respect, it's a determination made by the producer in developing the appropriate label for the material based upon its intended use.

With regard to the issue of making MSDSs available at the retail distribution level, NRMA suggested that OSHA define the term "commercial account" to ensure it is being properly interpreted and applied. They further suggested that this definition be related to selling items in large quantities and below the regular retail price. "Such accounts can be identified, and it would be less burdensome to notify such customers that MSDSs are available upon request. In fact, many retails firms have already done this under many state right-to-know laws." (Ex. 5-74).

The United Brotherhood of Carpenters and Joiners of America (UBCJA) similarly noted that with regard to MSDSs being available from retail distributors (Ex. 2-105):

> * * * [T]hose contractors who do purchase materials from retail outlets generally buy them from a building-supply house that sells such materials in larger quantities, and may give them a volume discount. These stores would have no problem supplying MSDSs to customers * * *

OSHA agrees with the NRMA that adding such a definition will clarify that many retail distributors have no need to maintain MSDSs because they do not generally supply

hazardous chemicals to commercial customers (*e.g.*, grocery stores, clothing stores). Therefore, we are proposing a definition for the term "commercial account" based upon NRMA's recommended criteria, and are inviting comment on the appropriateness of this approach. In addition, we are proposing to further modify the language in paragraph (g)(7) to indicate that when an employer purchases a consumer product from a retail establishment which does not have commercial accounts, and that employer needs to obtain a material safety data sheet, the retail distributor's duty is limited to providing, upon request, the name, address, and telephone number of the chemical manufacturer, importer, or distributor from which a MSDS can be obtained. We believe these modifications should clarify the duties of distributors of consumer products through retail distribution.

In summary, OSHA is not proposing to modify the consumer product exemption *per se,* although it is inviting comment on certain issues. The Agency continues to maintain that the mode of distribution of a product (*i.e.*, through retail distribution rather than wholesale) is not a criterion that is related to employee exposure or the need for information and therefore is not relevant to whether consumer products should be covered by this rule. The modifications proposed to the provisions regarding retail distribution should clarify them to ensure the regulated community is aware what needs to be done to comply with the revised final rule. OSHA invites comments on these issues as well.

OMB Determination. OMB has disapproved the information collection requirements for any consumer products that are exempted from the EPA requirements for community right-to-know (Ex. 4-67). OMB maintains that such an exemption would make the OSHA and EPA right-to-know requirements, which are closely linked, mutually

consistent. Using the same exemption in both rules avoids the situation in which employers must separate the paperwork for the "consumer products"into two groups: An OSHA "consumer product" and an EPA "consumer product." Furthermore, OMB believes this exemption "establishes objective criteria that enable upstream and downstream employers to determine what is exempted and what is included. Upstream suppliers would not be forced to speculate as to the identity of the final user (consumer or employer?) in determining whether the product is subject to the HCS. The flow of MSDSs and labels would be restricted to unpackaged substances or substances packaged for industrial or commercial use, for which detailed hazard information would be expected to have practical utility." OSHA invites comments on these conclusions as well.

Drugs. The original HCS covered the manufacture and formulation of drugs in the manufacturing sector. The rule included a labeling exemption for such products when they were labeled in accordance with the regulations of the Food and Drug Administration (FDA), but all other aspects of the program were applicable to the drug products as well as those chemicals used to make them. In preparing the revised final rule, OSHA determined that it is not necessary to cover such drugs in the non-manufacturing sector when they are in a form that is not likely to result in exposure to employees. Thus the rule totally exempted drugs when they are in a retail establishment (*i.e.*, a drug store of a pharmacy) and packaged for sale to a consumer (paragraph (b)(60(v)). Therefore all over-the-counter drugs were exempted from the point of packaging, and many prescription drugs were exempted as well since they are packaged prior to reaching the retail establishment. In addition, OSHA included an exemption for drugs in solid, final form for administration to a patient. As mentioned previously, this was based on the Agency's

determination that the potential for exposure is minimal for these drugs.

However, in recognition of the fact that there are various types of workers who may be exposed to drugs in hospitals or pharmacies (*e.g.*, nurses, nurses' aides, pharmacy aides, or technicians), OSHA did not exempt those drugs that are not solid or are not pre-packaged for sale to consumers (a pharmacy in a hospital would be considered to be a retail sale establishment for purposes of the exemption as written). Thus nurses required to mix anti-neoplastic drugs, for example, would be entitled to a material safety data sheet and training under the revised final rule. There was little discussion of the drug issue in the record prior to the revised final rule (*see, e.g.*, Ex. 2-176). However, since drugs are designed to be biologically active, OSHA wants to ensure that employees will be properly protected. As an example of potential problems, a recent report in the American Industrial Hygiene Association (Ex. 4-59) described one hospital's experience with a drug that is generated as an aerosol in a tent for administration to children. Nurses, respiratory therapists, doctors, and other employees are directly exposed when they enter the tent to care for the patients. Information on the drug indicates that such occupational exposure may result in carcinogenesis, fertility impairment, and fetotoxicity. In addition, however, employees who were exposed also complained of experiencing acute effects such as headaches, burning and dryness of the eyes, coughing and dryness of the upper respiratory tract. The hospital eventually devised a protective program for exposed employees based upon its experiences. A MSDS with recommendations for protective measures may have helped them resolve the situation prior to employees being exposed.

In response to the approach taken in the revised final rule, the National Wholesale Druggists' Association

(NWDA) (Ex. 5-85) recommended that OSHA recognize package inserts approved under FDA regulations as an acceptable alternative to material safety data sheets required under the rule. Additionally, the NWDA suggested that the *Physicians' Desk Reference,* a privately developed reference regarding drugs, also be considered to be an alternative to requiring MSDSs for drugs approved by FDA. Other commenters recommended that all prescription drugs be exempted since they are adequately covered by FDA labels, other available resources, and the medical training of persons handling or supervising handling of the drugs (Exs. 5-77 and 5-102).

Although the purpose of the Federal Food, Drug, and Cosmetic Act administered by the FDA is to protect consumers of such products and the general public (*see, e.g., Pharmaceutical Mfrs v. FDA,* 484 F. Supp. 1179, 1183 (D.Del 1980)), the product data inserts that accompany pharmaceuticals do contain some information that is analogous to that found on MSDSs and would provide some protection for employees. In particular, at 21 CFR 201.100(d)(1) (as paraphrased below), FDA requires that inserts for prescription drugs for human use must contain the following information: Adequate information for such use, including indications, effects, dosages, routes, methods, and frequency and duration of administration and any *relevant warnings, hazards, contraindications, side effects, and precautions, under which practitioners, side effects, and precautions,* under which practitioners licensed by law to administer the drug can use the drug safely and for the purposes for which it is intended * * * [in] the same [ ] language and emphasis as labeling approved or permitted * * *. (Italics added). This would be useful chemical hazard information for employees involved in administering the products even though em-

ployee protection is not the primary purpose of the information presented.

In addition to publication of such information in the package inserts themselves, the FDA regulations also state that (21 CFR 202.1(1)(2), as paraphrased below): [R]eferences published (*for example,* the *"Physicians' Desk Reference"*) for use by medical practitioners, pharmacists, or nurses, containing drug information supplied by the manufacturer, packer, or distributor of the drug and which are disseminated by or on behalf of its manufacturer, packer, or distributor *are hereby determined to be labeling* as defined [by] the Act." (Italics added.) According to the *Physician's Desk Reference* (PDR) in its *Forward* (40th ed. 1986), "drug information" in the PDR is "prepared by manufacturers, edited and approved by their medical department and/or medical consultant." PDR publishes the information verbatim. *Id.*

OSHA is proposing to modify the definition of "material safety data sheet" under the rule to indicate that a package insert approved by FDA, or an entry in the PDR prepared in accordance with FDA's requirements, be considered in compliance with the HCS requirements for a MSDS for these products. In addition, the exemption regarding solid drugs is being corrected to read "*e.g.*, tablets or pills" rather than "*i.e.*" as is currently indicated in the revised final rule (*see, e.g.*, Exs. 5-77, 5-85, and 5-102).

The Agency is inviting comment on this issue, particularly from employees who would be affected by this modification to ensure that they agree that this information is adequate for their protection. The existing exemption for labeling would remain in effect, employers would still have to have hazard communication programs where covered, and training would have to be given to those employees who have not previously been trained regarding the hazards and protective measures.

Although hospitals and health care institutions have not participated in the rulemaking to date, it appears to OSHA that another issue of concern in these institutions would be labeling of drugs dispensed by a pharmacist to a nurse who gives it to the patient. It is our understanding that these dispensed drugs may not be marked in any way, and since the nurse doesn't transfer the material from the labeled container, the portable container exemption for labeling would not apply. OSHA invites comment on suggestions for dealing with this issue for non-solid drugs.

OMB Determination. OMB has disapproved "coverage of any FDA-regulated drug" in the non-manufacturing sector because such coverage "would result in duplicative paperwork and is unlikely to provide additional information of any practical utility." (Ex. 4-67) Comment is also invited on this alternative of totally exempting all drugs from any coverage under the rule in terms of the non-manufacturing sector workplaces.

* * * * *

Multi-employer worksite provision. When OSHA promulgated the original final HCS, there was a requirement in the written hazard communication program that employers include in the plan and implement "the methods the employer will use to inform any contractor employers with employees working in the employer's workplace of the hazardous chemicals their employees may be exposed to while performing their work, and any suggestions for appropriate protective measures." 48 FR 53343, paragraph (e)(1)(iii).

This provision was included in the rule to ensure that contractor employers had enough information to protect their employees when performing work on manufacturing sites. Contractors are often used in this context to perform such tasks as servicing and cleaning out reactor vessels,

and their employees may be exposed to significant quantities of hazardous chemicals under those circumstances.

The rule did not address the opposite situation, *i.e.*, where a contractor brings a hazardous chemical to the manufacturing facility and exposes the manufacturing employer's employees. OSHA received many inquiries from manufacturers concerning this issue. It is apparently a pervasive problem, and these manufacturers wanted to be able to use some provision in the rule to compel contractors to provide such information. After a number of informal discussions with interested parties concerning how manufacturers might resolve this problem, OSHA included a recommendation in its compliance directive (Ex. 4-24) that employers consider including arrangements for an exchange of hazard information in their contracts. We had been told that this practice was being used successfully by a number of manufacturers.

OSHA believes that this problem of multiple employers using hazardous chemicals on the same site becomes even more pressing when the standard covers the non-manufacturing sector, particularly in the construction industry. In fact, representatives of the construction industry have long supported requirements to ensure information is available to them on such sites. As noted in the preamble to the expanded rule (*see* 52 FR 31858-59), the Advisory Committee on Construction Safety and Health (ACCSH) made recommendations for signs, labels, MSDSs, and training on construction sites as early as 1980 (Ex. 4-4. *Report on Occupational Health Standards for the Construction Industry* (5/16/80)). At that time the Committee felt "that the construction employer was not in a position to easily acquire information on the hazards associated with the many products and materials used in the industry, but that such information was fundamental to the preparation of warning signs, labels, training pro-

grams, and other important job safety and health activities." 52 FR 31859. The HCS did not exist at the time of the report, and the Committee thus recommended that a solution to the problem of lack and information would be to modify and extend the existing OSHA standard for material safety data sheets which at the time applied only to ship repairng, shipbuilding, and ship breaking (29 CFR 1915, 1917, and 1918):

> The modified standard would require manufacturers or formulators of harmful materials or agents to supply material safety data sheets along with their products in such a fashion that they reach construction employers * * * Under the standard, these data sheets would then be available at the construction work site for use by employers and employees.

Furthermore, ACCSH indicated in the same report that worker training should include the "exact identification of the material or process that is hazardous," "health effects of the material," and "location and availability of chemical identification lists and substance data sheets." ACCSH clearly believed that substance-specific information is necessary and appropriate on construction sites.

This issue was also addressed in a number of comments submitted in response to the ANPR. For example, the National Association of Home Builders (NAHB) (Ex. 2-223) addressed the issue of multiple subcontractors:

> It is crucial that OSHA recognize that any of these subcontractors may bring "hazardous" materials onto the jobsite, but xposure to these materials will not necessarily be limited to employees of the subcontractor. Thus, an electrician may be exposed to paint fumes and a plumber may be exposed to muriatic acid. Obviously, some system of conveying informa-

tion to workers must be developed whch accounts for this diverse workforce on the site.

Similarly, the National Erectors Association (Ex. 2-226) suggested:

> The customer and the general or prime contractor(s) should jointly develop and agree on a hazard communication program for that site. The general or prime contractor should in turn discuss and develop an appropriate hazard communication program with each of the subcontractors which he has control over. MSDS information should be discussed and updated at the weekly tool box safety meetings and the contractor progress meetings.

The National Constructors Association (NCA) (Ex. 2-108) also indicated that:

> Another major problem exists in that owner/clients do not automatically furnish their MSDS's to contractors working on the owner/client property, that are or could be, exposed to owner/client controlled hazardous substances.

In a later comment, NCA recommended that language be included in the expanded scope rule as follows (Ex. 2-225):

> Contractor employers using hazardous chemicals which may create a hazard to employees of other employers at a multi-employer workplace during normal conditions of use, or during a foreseeable emergency shall:
>
> * * * Inform the other employers of the storage and work locations of the hazardous chemicals.
>
> * * * Supply a copy of the material safety data sheet to each employer who requests a copy;

> * * * Review the material safety data sheet with other employers whose work will be directly affected by the use of the hazardous chemicals.

In addition, NCA included a provision in their recommended standard that addressed employee access to MSDSs at the worksite: "The contractor employer shall maintain copies of the material safety data sheets for each hazardous chemical used by the contractor employer, or furnished by another employer in the workplace, and shall make them readily accessible during each work shift to employees when they are in their work area(s)."

The American Road & Transportation Builders Association (Ex. 2-81) also addressed the issue: "Coordination of responsibility for MSDS access, labeling, and training, again, is necessary * * *. A possible compromise would be to make the information available where notices are generally posted, at a central location, where workers often report for work."

The United Brotherhood of Carpenters and Joiners of America (Ex. 2-105) reported that contractors are already making MSDSs available on construction sites:

> Many contractors now keep a loose-leaf book of MSDSs in their trailer on site for each access. Some contractor associations have produced loose-leaf binders that review the chemicals commonly used at worksites, their hazards, and the HCS requirements. There are also numerous private services available to provide data sheets on microfiche and on-line by computers * * *. Microfiche takes up little space (one loose-leaf binder) * * *. Any contractor with a personal computer could tie into an MSDS data base by purchasing a modem.

The International Brotherhood of Painters and Allied Trades (IBAT) indicated that, as a general rule, MSDSs

have not been provided automatically to contractors. However, paint manufacturers have usually provided them when requested. Given the short duration of some construction jobs, however, receipt upon request from the manufacturer is too late—the job is completed. "Failure to have the MSDS available ahead of time does not allow a contractor ample opportunity to take into consideration the kind of equipment that may be necessary to do a job safely * * *." (Ex. 2-199). The IBPAT confirms that MSDSs are necessary to properly protect painters, regardless of whether the paints are industrial coatings or consumer products: "If the paint manufacturer has any reason to believe that a product sold will be used by a professional, then the product should be provided with ways sufficent for the employer and the user to assure that the employer will receive the proper MSDS for the product * * *. In general, products purchased by professional paint or allied product applicators are used at quicker rates for longer periods of time thus the same product will often pose greater risk to professionals than consumers. The types of products so purchased are also extremely varied, ranging from rather benign to extremely hazardous * * *".

In preparing the revised final rule, OSHA took these comments into consideration and included a multi-employer worksite provision in the written hazard communication program requirements (52 FR 31880; paragraph (e)(2), as summarized below):

> Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example, employees of a construction contractor working on-site) shall additionally ensure that the hazard communication programs developed and implemented under this paragraph (e) include the following:
>
> * * * The methods the employer will use to provide the other employer(s) with a copy of the material safety data sheet, or to make it available at a central location in the workplace, for each hazardous chemical the other employer(s)' employees may be exposed to while working;
>
> * * * The methods the employer will use to inform the other employer(s) of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies; and,
>
> * * * The methods the employer will use to inform the other employer(s) of the labeling system used in the workplace.

As described in the preamble to the final rule (52 FR 31865), this type of provision is necessary to ensure that all employees have sufficient information to protect themselves in the workplace, regardless of which employer uses the hazardous chemical. It also ensures that employers have the necessary information to adequately conduct training, and to select appropriate protective measures for the work operation. Several OSHA-approved State Plan States have incorporated similar provisions in their expanded scope rules, and have successfully implemented them.

ACCSH reviewed the multi-employer worksite provision at its meeting on June 23, 1987, and did not raise objections to the items addressed, including the provision for MSDSs to be made available on multi-employer worksites (Ex. 4-6). ACCSH recommended that provisions regarding material safety data sheets be amended to preclude use of a chemical on-site prior to receipt of an MSDS (Ex. 4-6,

Tr. 218, 222), and that employees who travel between workplaces must have a copy of an MSDS in their vehicles for each chemical they will be using (Tr. 243).

One member cited an incident which occurred on a construction site involving a potentially carcinogenic material. The label indicated the potential carcinogenic effects, but did not provide suggested protective measures. This is consistent with the HCS since protective measures are only required to be included on the MSDS. The job was stopped for three days until the company could obtain the MSDS and ascertain from it the protective measures they needed to implement to protect the workers. "This unfortunately is what is happening with a lot of labels that are being used today. The labels are not specific enough, and as a result, the control measures that are necessary to use that materials are not readily available until they get a material safety data sheet and read the details on it." Tr. 188.

Another member suggested that obtaining and maintaining MSDS information on a worksite is analogous to obtaining and maintaining instructions for assembling or installing equipment and similar tasks that are commonly performed in construction. The paperwork necessary to provide instructions is routinely provided prior to use as the job would have to be stopped if it was not received from suppliers at that time. "If the same urgency was placed on the MSDS in getting it to the job as it was [on] getting instructions on how to put * * * together a piece of equipment on the job, it would arrive there." Tr. 190.

OSHA decided that the provisions as written adequately addressed the problems raised, *i.e.*, the standard already requires suppliers to provide the MSDSs, and employers to have MSDSs for each hazardous chemical in the workplace. However, OSHA believes that the ACCSH's discussion of the issues and the recommendations made regarding MSDSs clearly indicate that the Committee did not

envision hazard communication requirements for construction that do not include on-site availability for MSDSs.

The Committee also suggested that OSHA clarify the language of the rule to ensure that the written programs are maintained at each worksite, and OSHA adopted that recommendation in the revised final rule. Furthermore, on November 3, 1987, after reviewing the OMB letter regarding the information collection requirements of the rule, ACCSH unanimously reaffirmed its position that while a separate standard would be preferred for the construction industry, " the Committee does not feel it would be appropriate to exempt or remove protections existing now" under the HCS, and that the rule continued to apply in construction (Ex. 4-74).

As discussed above regarding consumer products, without MSDSs the hazard communication program will not be effective. The consensus of the participants in the rulemaking on the original final rule was that labels can only provide limited information—the detailed source of information must be the MSDS. Furthermore, adequate training cannot be conducted if the information is not available on the substances involved. As the National Paint and Coatings Association (H-022 Ex. 19-62) stated:

> NPCA concurs with the Agency's assessment of the functions and utility of the MSDS as the primary component of a Hazard Communications Program * * *. The label is limited in the amount and detail of hazard information which it can contain and still effectively communicate. The MSDS serves as the source document and amplification of the information presented on the label * * * NPCA has had a long-standing policy of recommending that MSDS's

be provided to customer/employers even though not as yet required by law.

OSHA agrees with NPCA's assessment of the importance of MSDSs, although their more recent comments do not appear to be consistent with this approach since they have suggested that MSDSs are not necessary for paint contractors (Ex. 5-75). OSHA believes the need for such information is just as critical in the non-manufacturing sector where employees are exposed to the same hazardous chemicals as in the manufacturing sector. Many other manufacturers and their representatives concurred with OSHA's conclusion that a program cannot be effective without all of the major components included in the OSHA rule—including MSDSs being available to employees and employers at the job site (*see, e.g.*, H-022 Exs. 19-62, 19-91. 19-124, 19-156, 19-185, and 19-199.)

The comments received following publication of the final rule are mixed on this issue. One commenter (Ex. 5-108) posed a question that we believed was answered by the multi-employer worksite provision: "Although the law for training and maintaining MSDS will put the responsibility for their employees on the subcontractor, how about the exposure of two or more subcontractors' employees to each other, our exposure to products subcontractors' employees are using and their employees' exposure to products we are using? These are not everyday problems in manufacturing, therefore, here is another complex area that should be considered if the standard is to be explained." We agree, and hence addressed it in the written program requirements.

Several commenters believed that the provisions would not work because of the number of contractors on the site and the potential number of chemicals (Exs. 5-83, 5-84, and 5-89). One suggested alternative, however, was to

allow contractors to deposit copies of their MSDSs in a central location on site or make them available on some reasonable basis such as in their truck. This is already explicitly permitted under the rule. Similarly, the National Association of Home Builders (NAHB) testified during the OMB paperwork meeting (Ex. 5-76, Tr. 53) on the issue of keeping MSDSs on a multi-employer worksite. When questioned as to the feasibility of keeping them at a central location in the site, NAHB indicated that the preamble to the revised final rule appeared to allow such an option, but the standard did not. "Now if OSHA's honest opinion is that a central MSD depository on the site will take care of multi-employer worksites, let's see it in the rule * * *." *See* paragraph (e)(2)(i) stating that the written program shall include methods the employer will use to either "provide the other employer(s) with a copy of the material safety data sheet or make it available at a central location in the workplace." 52 FR 31880. This is in the rule itself, and appears, therefore, to address NAHB's statement.

Some commenters have clearly misinterpreted the requirement of the rule for multi-employer worksites. For example, the Alliance of the Textile Care Associations (ACTA) (Ex. 6, Tr. 190-198) argued that they would have to maintain in their facilities MSDSs for all chemicals at their customers' sites. "An industrial laundry would be required to maintain material safety data sheets and other information from between 1,000 and 5,000 businesses. If one assumes only very conservatively 10 material safety data sheets per account, this would mean that an industrial launderer would be confronted with between 10,000 and 50,000 material safety data sheets organized by service route * * *." The HCS does not require any such collection.

First of all, there is no requirement to maintain MSDSs for products at other sites so the launderer would not be required to maintain in its facilities any MSDSs from the facilities on its routes. MSDSs are only required for the chemicals used at the facility of concern. Secondly, service employees who are simply picking up and dropping off materials such as described in this testimony (10 minutes in the facility) are not generally "working" on that site in the sense of the multi-employer worksite provision, and are probably not "exposed" to the chemicals in the facility. The ACTA indicates that the HCS requires training on each and every chemical—this is not true. The HCS requires training on hazards, and this can be presented either by chemical or by categories of hazard (*e.g.*, flammability). In most situations, it is more practical and effective to train by hazard categories. Furthermore, the training teaches employees to use substance-specific information available to them on labels and material safety data sheets. The delivery people should receive such training, be advised to read lables, and trained to request material safety data sheets if they are "exposed" in the conduct of their duties at the customer's site and need more information. Availability of the MSDSs at the customer's site satisfies the requirements of the rule.

Although some of the commenters mentioned the large number of chemicals on-site as being a potential problem, others argued that construction sites have few hazardous chemicals, and therefore do not need right-to-know programs (*see, e.g.*, 5-17, 5-58, 5-81, 5-86, 5-108, and 5-117.) However, it was interesting to OSHA to note that the alternative recommended by these commenters to the rule as written was to require the following (Exs. 5-10, 5-65, and 5-117):

> Post a list of hazardous chemicals at the job site with a copy of the MSDS.

> Each contractor is responsible for posting only MSDS for substances they are using.
>
> Make available to all employees a list of hazardous substances being used at site.
>
> Require proper labeling for all hazardous substances prior to purchase.
>
> Require contractors to provide personal protective equipment for their employees.

It appears that if these construction employees are recommending that MSDSs be maintained at the worksite, they must consider it to be feasible and appropriate. This worksite accessibility appears to be feasible at even the smallest sites (IBPAT, Ex. 2-199):

> The painting contractor usually has an office, a trailer, a hotel room, a car, a shoe box—somewhere—from which business is conducted and where are found documents pertaining to the job, such as bid specs, purchase orders, employment rosters, coating technical data sheets and so on. All of these are materials which from time to time during the course of a job the employer will be required to make available or use at the job site. MSDS's would be treated similarly.

OSHA still believes that the multi-employer worksite provision is critical to the proper functioning of the rule, and that MSDSs are necessary to ensure that proper information is available to both employers and employees. We are inviting further comment on this provision.

OMB Determination. OMB has stated that the "practical utility for the requirement to bring MSDSs on-site at multi-employer workplaces" has not been demonstrated. According to OMB, an acceptable option would be to "require employers at multi-employer worksites to keep labels intact on any containers they bring onto the work-

site; to train their employees in the hazards with which they work directly, in recognition of and response to the general hazards that are likely to be introduced by other employers, and in the need to observe hazard labels on the worksite and request MSDSs when further information is needed; and to provide MSDSs to other employers upon request." OMB has disapproved the "requirement to bring MSDS onto multi-employer worksites." OMB's suggested approach "relies on labels and general hazard training to protect workers from substances brought onsite by other employers." OSHA invites comment on this approach as well.

* * * * *

IV. Clearance of Information Collection Requirements

The information collection requirements of the 1987 revised final standard were reviewed by the Office of Management and Budget (OMB) under the authority of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). OSHA subsequently published in the **Federal Register** the approval numbers for the rule (1218-0072), and OMB's letter regarding its disapproval of several items (December 4, 1987, 52 FR 46075; Ex. 4-67). As discussed above, OMB disapproved: (1) The requirement that material safety data sheets be provided on multi-employer worksites; (2) coverage of any consumer product that falls within the "consumer products" exemption included in section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986; and (3) coverage of any drugs regulated by the Food and Drug Administration in the non-manufacturing sector. In additon, OMB determined that OSHA should reopen the rulemaking on the HCS to consider alternatives to the definition of "article" which was

included in both the original and revised final rules. Lastly, OMB conditioned paperwork approval upon OSHA's consulting with the U.S. Small Business Administration and the Department of Commerce in order to develop a plan for a Federal administrative effort that will provide assistance to the regulated industries to alleviate the paperwork burdens and costs. On April 13, 1988, OMB extended until April 1991 the approval of all provisions except the three that were previously disapproved.

In accordance with the Paperwork Reduction Act and its implementing regulations issued by OMB (5 CFR Part 1320), OSHA certifies that it has submitted the information collection requirements contained in this proposed revision to its current standards to OMB for review under section 3504(h) of that Act. Comments on these information collection requirements may be submitted by interested parties to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for the Occupational Safety and Health Administration, 726 Jackson Place, NW., Washington, DC 20503. OSHA requests that copies of such comments also be submitted to the OSHA Docket Office as part of the record for this rulemaking.

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Order of The Supreme Court Granting The Writ of Certiorari

Supreme Court of the United States

No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.,
PETITIONERS

v.

UNITED STEELWORKERS OF AMERICA, ET AL.

ORDER ALLOWING CERTIORARI. Filed May 15, 1989.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

May 15, 1989

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